UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 16

North American Central School Bus a.k.a. Illinois Central School Bus, Employer, and International Brotherhood of Teamsters, Local Union 997, Petitioner.	)	NLRB Case 16-RC-317560

NORTH AMERICAN CENTRAL SCHOOL BUS'S POST-HEARING BRIEF

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board ("the Board"), the Employer, North American Central School Bus a.k.a Illinois Central School Bus ("the Employer," "Texas Central," or "the Company") by counsel, files this Post-Hearing Brief in response to the International Brotherhood of Teamsters, Local Union 997's ("Petitioner" or "the Union") Objections to the Election conducted on May 25, 2023. For the reasons set forth below, the Union's Objections should be overruled and a Certificate of Results should be issued.

I. PROCEDURAL HISTORY

The Union filed the Petition on May 8, 2023. (Bd. Ex. 1).[1] The Union sought to represent "all full-time and regular part-time drivers and monitors," at the Employer's Keller location. (Bd. Ex. 2). The election was held on May 25, 2023. The employees chose not to be represented by the Union by a vote of 165 to 78. There were 14 challenged ballots. On June 2, 2023, the Union filed

[1] The Board's Exhibits will be referred to throughout as "Bd. Ex. X." Joint Exhibits will be referred to throughout as "Jt. Ex. X." The Union's Exhibits will be referred to throughout as "Pet. Ex. X." The Employer's Exhibits will be referred to throughout as "Er. Ex. X." References to the transcript will read "Tr. __."

six vague objections to the election. On June 21, 2023, the Regional Director ordered a Hearing on the Objections ("Hearing") that took place on June 28, 2023.

II. INTRODUCTION

The Union's Objections are wholly frivolous. During its brief case, the Union did not present *any* evidence demonstrating the Employer's alleged election misconduct. The majority of the Union's case rests on conduct that took place outside of the critical period. The statements which the Union believes are coercive are, in reality, facts relayed by the Employer to the employees regarding the Union's existing contracts and the Employer's personal experiences with the Union. The only specific statement the Union proffers in support of its Objections was not even made by the Employer. The Union did not meet its high and heavy burden to show the Employer engaged in any objectionable conduct. Accordingly, the Hearing Officer should overrule the objections, and the Board must honor the free choice of the drivers and monitors, expressed by an overwhelming margin, not to be represented by the Union.

III. FACTUAL BACKGROUND

A. Employer's Operations

Texas Central provides passenger transportation services to schools. (Bd. Exs. 1, 2). It employs drivers and monitors at its Keller, Texas location ("Keller ISD"). (Bd. Ex. 2). Texas Central entered a contract with Keller ISD roughly three or four years ago to provide transportation services. (Tr. 146). When they got the contract, the Keller ISD employees became Texas Central employees. (*Id.*) They still refer to the Employer as "Keller ISD."

Keller ISD's Main Transportation Department ("Main Lot") houses the manager's office, assistant manager's office, field trips office, payroll, billing, and dispatchers. (Jt. Ex. 7; Tr. 20, 21). The Main Lot also has a breakroom, safety office, repair shop, and multiple employee parking lots.

(*Id.*) Employees may also clock in and out at the Main Lot. (Tr. 20, 21). Not all employees report directly to the Main Lot. (Tr. 23). Texas Central has several "park-outs," also known as "remote lots." (*Id.*) A "park-out" is a lot housing buses away from the Main Lot. (*Id.*) Rather than going to the Main Lot every day, drivers may report directly to a park-out location to pick up their bus. (*Id.*)

In addition to the Main Lot, drivers may report to either the Keller, Cap Rock, or Fossil Ridge park-outs. (Tr. 23-27; Jt. Exs. 8, 9, 10). Texas Central has an "office bus" located at each park-out. (Tr. 24, 25). The office bus is a spare bus offering the employees a place to store their keys. The bus also has a remote time clock. Any information Texas Central needs to share with employees, they place in the office buses. (*Id.*) Drivers also pick up their daily clipboard with their work assignments at the office bus. (Tr, 198).

B. April 2023 – Before the Critical Period

The Union began its organizing efforts in early April 2023.[2] Cuyler Elmore ("Elmore") is a Field Organizer for the Union. (Tr. 39). Michelle "Shelly" Goodman ("Goodman") also works as a Field Organizer. (Tr. 41). Both Goodman and Elmore engaged in organizing activities at Texas Central. (*Id.*)

Elmore arrived at the Employer's facility in early April. (*Id.*) Goodman arrived a few days prior. (*Id.*) By the time Elmore arrived, Goodman had already spoken to two unidentified workers. (Tr. 43). Elmore and Goodman stood on the sidewalk, grass areas, or near the cars at the Main Lot and distributed literature to employees. (Tr. 43, 44). On the weekends, Elmore and Goodman went to the Fossil Ridge park-out to conduct "recon work." (Tr. 47).

On April 13, Elmore and Goodman made their way to the Fossil Ridge park-out during business hours. (Tr. 45). The first morning they arrived, Elmore and Goodman approached drivers

[2] All dates referenced hereinafter took place in 2023 unless otherwise stated.

on Company property. (Tr. 47). After drivers parked their buses, Elmore and Goodman "walk[ed] up to them and talk[ed] to them." (*Id.*) They left later that morning and returned in the afternoon. (*Id.*)

When they returned, they saw Jim Koons ("Koons"), District Manager, speaking to employees outside of the office bus. (Tr. 45; 47). Elmore and Goodman continued to approach workers by their buses despite Koons' presence. (Tr. 48). Koons witnessed Elmore and Goodman trespassing on Company property and asked them to leave, but they did not. (Tr. 49). Koons approached them again and asked them to exit the Company's private property. (*Id.*) Around five drivers saw or overheard the interaction. (*Id.*)

Driver Fatima Munoz ("Munoz") worked out of the Fossil Ridge park-out. (Tr. 146). After returning from her charter in the afternoon on April 13, Munoz also saw Koons at Fossil Ridge. (Tr. 147). She did not witness Koons have a conversation with Elmore or Goodman. (Tr. 148).

Driver Michael Short ("Short") also worked out of the Fossil Ridge park-out. (Tr. 152, 153). Short saw Koons at Fossil Ride the evening of April 13. (*Id.*) Short did not witness a conversation between Koons, Elmore, and Goodman. (Tr. 154). Short has seen Koons maybe twice before at Fossil Ridge: once in approximately 2019 and once in February 2021. (Tr. 152).

Vice President of Human Resources, Keith Lane ("Lane"), informed Teamsters Eastern Region Vice President, Matthew Taibi ("Taibi") that Elmore's and Goodman's "lingering around school buses" presented a significant safety concern to drivers. (Jt. Ex. 14). Lane told him, "This lingering around school buses included walking among operating large vehicles even while these large vehicles were backing up and making other movement." (*Id.*) He also emphasized the safety concerns with having strangers present on the lots during "child-check processes." (*Id.*) He told Taibi, "In the current environment, strangers on our student transportation facilities, around school

property, and hanging out near school buses cannot be ignored." (*Id.*) In other words, Elmore's and Goodman's presence created safety concerns by way of drivers becoming distracted, and concerns regarding strangers around young children. In this current political climate—with mass shootings occurring frequently at schools—the Employer cannot take the risk that strangers will remain on its private property without restriction.

On April 17, a few days after Elmore and Goodman trespassed at Fossil Ridge, they drove to the Keller park-out. (Tr. 51; 57). They engaged in the same routine: approached drivers in the morning, left late-morning, then returned in the afternoon. (Tr. 52). This time, instead of approaching drivers at the bus, they approached them at their personal vehicles and the office bus—areas still on Company property. (Tr. 54; Pet. Ex. 4). They did not see any managers on the property in the morning, but upon their afternoon return, Ken Harcrow ("Harcrow"), Contract Manager, was present. (Tr. 52). Elmore continued to approach workers on the property. (Tr. 53). Harcrow informed them that they could not be on the property. (Tr. 55). Harcrow, Goodman, and Elmore argued over whether or not school property was public or private property. (*Id.*) One driver, Sheri O'Neil ("O'Neil"), witnessed the exchange, but did not hear the entire conversation. (Tr. 95). Eventually, Harcrow drove away. (Tr. 55).

Elmore and Goodman then ventured to the Main Lot. (Tr. 60). They stood on the sidewalk and waved to or spoke to "no more than 25, but no less than 20" drivers as they drove in and out of the lot. (Tr. 60, 61). Approximately seven minutes later, Harcrow appeared outside and spoke with Driver Scott Graham. (Tr. 60, 61).

Ineligible voter, possible supervisor, and former employee as of the time of the voter list, Jessica De La Fuente ("De La Fuente") testified to a staff meeting Koons called on April 17. (Tr. 81, 82). Koons did not invite any eligible voters to the meeting, and none attended. (Tr. 82). During

the meeting, Koons explained the Employer was aware of the Union's presence. (*Id.*) He informed staff to "follow[] all procedures. Make sure you're following all policies." (Tr. 82, 83). Koons told stories of past union drives and the strategies they used to demonstrate the negatives of a union. (Tr. 83). The staff speculated as to who started the drive and they mentioned a former employee named "Sylvia" who left the Employer more than one year ago. (Tr. 84; 89). They did not discuss anything further.

Following these incidents, the Company distributed a series of flyers. (Jt. Exs. 1-4). The Company mailed the first flyer on April 17, 2023, left the second flyer in the office bus for employees to pick up on April 20, 2023, mailed another flyer to employees on April 27, 2023, and left another flyer at the time clock in the Main Lot (and possibly the various park-outs) on April 28, 2023. (*Id.*; Tr. 29-24).

C. May 8 Interaction

On May 8, 2023 at 8:56 a.m., Elmore and Goodman returned to the municipal lot at the Main Lot. (Tr. 70). The municipal lot is "on the opposite end of the entire lot…on the other side of the building…in the very, very back." (Tr. 75). Keller ISD workers, drivers, and monitors share this lot. (Tr. 71). Harcrow saw them on the lot and asked them to leave, but they refused. (*Id.*) "It was a very brief interaction, maybe a minute, tops, and then he turned around and left." (*Id.*) Two employees, perhaps four, witnessed the brief interaction. (Tr. 72). One of those drivers, Jeremy Cook, walked past Harcrow during the interaction and left the area. (Tr. 73). It is unclear what time the Union filed the representation Petition on May 8.

D. May 9 Meetings

Koons hosted three voluntary informational meetings with the drivers and monitors on May 9. (Tr. 101, 102). O'Neil and Short attended the meetings. (Tr. 101; 159, 160). Short attended all

three. (Tr. 154). Koons led the meeting using a PowerPoint and did not deviate from the slides. (Tr. 155, 156; 186). He was consistent with his messaging, and did not verbally contradict anything displayed on the PowerPoint. (Tr. 128).

Koons discussed the Lewisville location's Collective Bargaining Agreement ("Lewisville CBA") with the Union. (Tr. 156; Jt. Ex. 13). Texas Central has a facility in Lewisville, Texas—very close geographically to Keller ISD. (Jt. Ex. 13). The Lewisville location has a collective bargaining agreement with Teamsters Local 745. (*Id.*) The Lewisville CBA is in effect from May 19, 2021 through August 31, 2025 and covers a bargaining unit comprised of drivers and monitors—identical to the unit here. (*Id.*) The Lewisville location is also a party to the Illinois Cooperative Agreement, explained in more detail below. (Jt. Ex. 12). In other words, the Lewisville CBA is a key document to show the results of bargaining with the Teamsters locally while also being a party to the overarching Illinois Cooperative Agreement.

The point of the presentation itself was to compare the two locations'—Lewisville and Keller—substantially different benefits. (Tr. 196). Attendees asked questions about the comparisons made between the Lewisville CBA and the current wages and benefits employees at Keller ISD received. (Tr. 103). O'Neil testified to Koons' lawful statements made during the meeting, such as explaining the results of a Company satisfaction survey given at the Lewisville and Keller ISD locations, and stating the Employer "felt that it would be better for Keller not [to] have a union." (Tr. 103, 104). Short asked Koons, "What are we guaranteed to receive as far as pay increases?" (*Id.*) Koons answered honestly that employees are not guaranteed any pay increases ever at Keller ISD. (Tr. 159, 160). In response to many questions, Koons responded, "In my opinion, the Union is not a good fit for Keller ISD." (Tr. 158). Short audio recorded all three

meetings. (Tr. 156, 157). At no point during the presentation does it say the Lewisville CBA is the exact agreement the Keller employees would receive.

The Employer mailed a letter on May 11, 2023, two days after the meeting. (Tr. 101, 102; Jt. Ex. 6). The letter includes a line that reads: "As we've repeatedly stated, we support the rights to have a vote. Therefore, we refused to recognize the Teamsters absent a vote of our employees. We doubt their claim to represent a majority of you." (Tr. 102).

E. Short's Interaction with Employee "CJ"

Roughly three weeks prior to the vote, an alleged shop "supervisor" named "CJ" sat on Short's bus—either in the first row or in the stairwell—while Short fueled the bus or while he sat in line waiting for fuel.[3] (Tr. 166; 173). CJ said "hi" and watched the line to make sure everything went smoothly. (Tr. 173). Short is not aware of another time CJ engaged in behavior like this in the four years or so prior. (Tr. 166).

The only time Short interacted with CJ "at base," (the Main Lot) and not on his bus, was when Short sat down to organize the Facebook list. (Tr. 167). Sometime between the May 17 meetings and the May 23 meetings, Short went to the main building and sat at the picnic tables right outside of the breakroom. (Tr. 167, 168). While sitting at the picnic tables, he scrolled through Facebook on his cell phone. (*Id.*) According to Short, the drivers and monitors had a private Facebook group and Short served as the group administrator. (Tr. 177). He checked the list of group members, deleted former employees from the group, and added new employees to the group. (*Id.*) As he did this, CJ approached, and "was within earshot and chitchatted with" Short. (Tr, 167). Two other employees also sat at the picnic tables eating. (Tr. 182, 183). They exchanged small talk and nothing more—nothing about the Union. (Tr. 181, 182). CJ remained at the picnic tables

[3] The Union did not identify CJ's last name.

the entire time Short sat at the picnic tables. (Tr. 178). This situation occurred roughly twice. (Tr. 179).

The record does not clearly reflect whether CJ was a supervisor.[4] Based on Short's limited understanding, CJ has the authority to write him up regarding care and maintenance of his bus. (Tr. 173). However, he has no personal knowledge of CJ's disciplinary authority, and no other employees told Short that CJ disciplined them. (Tr. 174, 175). Short has never received discipline, so he has no actual experience being disciplined by CJ. (Tr. 174).

F. May 17 Meetings

Lane held three voluntary informational meetings with drivers and monitors on May 17. (Tr. 105). Lane read directly from the PowerPoint and did not say things to the employees verbally that contradicted statements on the PowerPoint. (Tr. 127, 128). O'Neil attended the first meeting and Short attended the first and third meetings. (Tr. 105), He presented a variety of topics at all three meetings.

1. Derogatory Clown Video

The first part of the presentation addressed a leaked recording. (Tr. 105). Lane discovered someone recorded Koons' May 9 meetings and posted the recordings to YouTube. (*Id.*) The person attached the recording to a video with photos of unpleasant-looking clowns. (Er. Ex. 1). Lane believed a Union organizer or supporter was responsible for the posting. (Er. Ex. 1; Tr. 105). Lane stated:

> We were very disappointed the Teamsters organizers portrayed Jim Koons publicly in a derogatory and offensive manner on YouTube by inserting various evil clown pictures over his voice. It is very apparent to us and extremely sad the Teamsters organizers do not understand the terms 'integrity and mutual respect.' Please know that we will not respond in a like manner to these low-road tactics.

[4] The Employer did not and does not stipulate to CJ's supervisory status under Section 2(11) of the Act.

(Er. Ex. 1).

At that moment, Short—outspoken, well-known, and self-proclaimed "adamant" Union supporter—stood up and took credit for posting the video. (Tr. 106; 135; 161; 182). He distributed the recording via private link in the private Facebook group for Keller ISD drivers and monitors only. (Tr. 162). Lane said the video "was done in poor taste," and did not comment further. (Tr. 162).

During the second May 17 meeting, Lane again blamed the Union organizers for the clown video. (Tr. 164).

2. Illinois Cooperative Agreement

The Illinois Cooperative Agreement is an agreement entered into by the Teamsters and Illinois Central School Bus. (Jt. Ex. 12). It currently covers operations at 14 locations and expires on September 30, 2027. (*Id.*) The agreement "extend[s] and appl[ies] to any operation where an affiliate of the IBT is certified or recognized as the bargaining unit representative." (Er. Ex. 1; Jt. Ex. 12). "All employees covered by this Illinois Cooperative Agreement and the various local agreements, supplements and/or riders shall constitute one (1) bargaining unit." (*Id.*) Stated differently, all locations party to the agreement will abide by the same contract terms with limited variation. Article 3 of the Illinois Cooperative Agreement states, in part, "an employee who fails to satisfy the financial requirements or other obligations of the Local Union as herein provided, shall be terminated seven (7) working days after his/her Employer has received written notice from an authorized representative of the Local Union…" (*Id.*) Lane presented these exact facts to the employees at the meeting.

Lane also explained the dues provision, explaining, "if you didn't pay your union dues, the union could have you fired." (Tr. 107). Lane showed the drivers a copy of a termination letter sent

from the Teamsters to an employee in another state. (Tr. 108; Er. Ex. 1). The employee's "discharge was related to not paying union dues." (Tr. 108, 109). O'Neil felt it "wasn't fair to be showing that as a representation of what things might be here in Texas." (Tr. 108).

Lane told employees they could ask the Union organizer for a copy of the Illinois Cooperative Agreement. (Tr. 179). Short asked the Union organizers for a copy, and they brought several to a Union meeting. (Tr. 179, 180).

The PowerPoint stated: "Teamsters have already negotiated a collective bargaining agreement containing 49 articles which covers Keller's drivers and monitors. You were not included in the negotiations, ratification process, or allowed a voice on the Illinois Cooperative Agreement. However, it will apply to you. Locally negotiated conditions will be 'narrowly limited in scope.'" (Tr. 138; Er. Ex. 1). Lane spoke about the agreement in the context of the election relaying the fact that should the employees vote for the Union, they would necessarily became a party to the agreement.

3. Right to Work Language

Lane also presented on Texas's Right to Work law and its application to a collective bargaining agreement and the Illinois Cooperative Agreement. Lane's PowerPoint read:

> Texas is a right to work state. Thus, mandatory membership in the union cannot be part of the CBA. However, with the exercise of right to work, a bargaining unit member may lose rights such as attending meetings, assisting in the bargaining process, voting on CBAs, running for office, voting for officers, attending conventions, and others.

(Er. Ex. 1).

G. May 17 Letter

Following the May 17 meeting, Lane mailed a letter to all drivers. In the letter, Lane expounded upon the Illinois Cooperative Agreement entered into between the Teamsters and the Illinois Central location. (J. Ex. 5). Lane explained:

> [W]e learned that the Teamsters have already negotiated a Collective Bargaining Agreement called the Illinois Cooperative Agreement that will cover you through at least 2027. The Illinois Agreement was negotiated last year and contains nearly 50 articles. You will automatically be covered by this agreement without the chance to vote on it or help bargain the language. The Illinois Agreement also insures you will never be able to vote out the Teamsters if you want to. The Teamsters made you part of one bargaining unit which includes locations in at least four states and the Chicago area.

(J. Ex. 5).

H. May 23 Meeting and Flyer

Koons presented the May 23 PowerPoint as well. (Tr. 188). He followed the slides verbatim. (*Id.*) One slide clarified former statements regarding the Illinois Cooperative Agreement, and said it "Makes it virtually impossible to ever vote the union out – even if Keller wants them gone." (Er. Ex. 3). None of the testifying witnesses attended the meeting.

The Union did not present any evidence that it attempted to clarify or correct any of the Employer's presentations or flyers.

The same day, the Employer provided handouts via the office bus. (Tr. 115; 198; Pet. Ex. 10). In the letter, Koons wrote that the Union organizers unfairly intruded into the personal lives of the location's managers. (Tr. 192). Koons wrote this based on personal experience. (Tr. 193).

Koons is a private person; he keeps his personal and work lives separate. (*Id.*) During the campaign, Koons' father passed away and he went out on leave. (*Id.*) Koons told everyone he had a family emergency; Koons did not tell anyone about his father's passing or where he planned to bury his father. (Tr. 194). Prior to the election, Goodman offered her condolences to Koons, which

surprised him because he did not share this information with Goodman or any employees. (Tr. 193). Koons discovered a malicious rumor going around that he fibbed about his father's death. (*Id.*) Koons connected the dots.

I. The Mysterious "Vote No To Union" Poster

The Union presented a poster entitled "Vote No To Union" which they claimed to be posted at the Main Lot ("the Poster"). Around the beginning of May, O'Neil heard about the Poster posted on a bulletin board in the main building. (Tr. 120, 121; Pet. Ex. 11). Employees who passed through the building texted photos of the Poster to her. (Tr. 120). O'Neil did not have any idea who prepared the flyer. (Tr. 121; Pet. Ex. 11).

The first time Short saw a copy of the Poster was around May 17. (Tr. 168; Pet. Ex. 11). "It was given to [Short] by another driver, who, it was given to them by another driver, and they didn't mention where they got it from." (Tr. 168). Short received this while he was on his route. (Tr, 169). Short immediately took a photo of the poster and sent it to Elmore "and the union organizers too, so that they were aware that this is being handed out at and around base, ***not necessarily by management***, because I don't know where the original version came from." (*Id.*) (emphasis added).

Short also received the poster via text message showing that it was posted on the bulletin board. (Tr. 169). He received the text roughly Monday or Tuesday prior to the election, May 22 or May 23. (Tr. 170). Short never actually saw the poster on the bulletin board. (Tr. 171). He did not "pass that way" in order to get to the election. (Tr. 172). On May 25, the day of the vote, O'Neil passed the bulletin board, and the Poster "was still there." (Tr. 119). The Union did not present any evidence that they alerted the Employer or the Board Agent to the Poster—despite their well-established knowledge of its existence. They did not even establish the Employer had knowledge

of the Poster whatsoever. Employees can access the break room without passing by the bulletin board, so employees did not necessarily pass the poster before entering the voting room. (Tr. 174).

J. Election Day

The election itself took place in the breakroom. Inoperable security cameras hung on the walls in the breakroom. (Tr. 66, 67). During a pre-election Zoom meeting, the Board Agent instructed the Employer to cover the cameras and they did so. (Tr. 67). On election day, Elmore personally inspected the cameras that the Employer covered with tape. (*Id.*)

At some point during the election, a Keller ISD security guard driving a Keller ISD marked vehicle—not a Company security guard—entered the breakroom to check on the inoperable cameras. (Tr. 67, 68; Tr. 126). The security guard received a phone call from an unknown individual that the cameras were not working. (Tr. 68, 69). The Board Agent told the security guard the Board was hosting an election, the cameras cannot be operable during the election, and asked him to come back later. (*Id.*) The security guard left. (Tr. 69).

While waiting for the final count, Goodman and Koons chatted. During the conversation, Goodman made a comment about Koons' burying his father in Jefferson Barracks. (Tr. 195). The comment took Koons off guard. (*Id.*) Not even his employer—Lane or anyone else in management—knew where his father was buried. (*Id.*) In other words, Goodman had to have done her own research into Koons' personal life to discover where he buried his father.

Overall, the witnesses exercised their right to vote. O'Neil testified unequivocally that she exercised her right to vote on May 25 and she was able to vote for who she wanted to vote for. (Tr. 128, 129). Short testified without hesitation that he had an opportunity to vote his conscience and he got to vote for exactly who he wanted to vote for. (Tr. 172).

IV. THE OBJECTIONS SHOULD BE OVERRULED IN THEIR ENTIRETY

The burden of proof in an election objection lies with the party who files the objection. Moreover, "the burden of proof on parties seeking to have a Board supervised election set aside is a ***heavy one***." *In re Lalique N.A., Inc.*, 339 NLRB 119 (2003) (emphasis added). *See also Sonoma Health Care Center*, 342 NLRB 933 (2004) (emphasis added) ("An objecting party must show by ***specific evidence*** not only that the improper conduct occurred, but also that it interfered with the employees' exercise of free choice to such an extent that it ***materially affected the results of the election***.") (emphasis added).

The Board has long maintained its policy disfavoring disturbing election results because "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees," *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991).

In evaluating whether improper interference occurred under this standard, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subject to the misconduct; (4) the proximity of the conduct to the election date; (5) the degree of persistence of the misconduct in the minds of the voting unit employees; (6) the extent of dissemination; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. S*ee, e.g., Taylor Wharton Division*, 336 NLRB 157, 158 (2001).

Of note, the Board is much more likely to set-aside an election where the vote was close, and conversely, less likely to set aside an election where the vote was not close. *See, e.g.*

Connecticut Health Care Partners, 325 NLRB 351, 368 (1998) ("[T]he closeness of the vote is an especially significant factor." (internal citations omitted)).

Here, ***the Union lost by 87 votes***. These results in and of themselves demonstrate the sheer frivolity of these Objections. Only 14 challenged ballots existed—not enough to affect the results of the election. Out of the 243 employees who cast votes, the Union presented *four* employee witnesses. One of the witnesses left the Employer's employ prior to the vote and was not an eligible voter. All of the witnesses indicated they were not discouraged from voting their consciences and in fact did so. There is simply no evidence in the record of any materially adverse effect on the free choice of a single employee. The Union simply did not present adequate support for its case.

V. SPECIFIC OBJECTIONS[5]

As an initial matter, the Union's Objections are unreasonably vague. It did not present specific explanation for its Objections, nor did it present adequate evidence at the Hearing allowing the Employer to deduce relevant facts. Despite the Union's failure to do so, the Employer addresses each Objection in turn to the extent it understands the Union's allegations.

A. Objection 1: Both immediately before and during the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by surveilling employees while they were engaged with the Union organizers.

The Employer did not unlawfully surveil employees while they were engaged with Union organizers. "The test for impression of surveillance is whether employees could reasonably assume from the employer's statements or conduct that their activities had been placed under surveillance." *Needham Excavating, Inc.*, 371 NLRB No. 146 at 23 (2022) (citing *BMW Mfg. Co.*,

[5] Prior to the Hearing, the Union submitted a written request to withdraw Objection 3. At the Hearing, the Union withdrew Objection 2. This morning, July 13, 2023, counsel for the Union emailed undersigned counsel and requested to withdraw Objection 6. (*See* **Exhibit A**, Email from David Watsky to Andrew Turner which the Employer formally requests be made part of the record of this case).

370 NLRB No. 56, slip op at 1 fn.5 and slip op. at 20-21 (2020)). "The test is objective and requires a showing that, under the circumstances, the employer's conduct interferes in some manner with employees' Section 7 rights." *Id.*

1. All of the alleged conduct took place outside of the critical period.

As a threshold matter, even if the Employer's conduct constituted surveillance—which it does not—every single instance of the Employer's interaction with organizers took place well before the critical period. Statements made outside of the critical period cannot form the basis for objectionable conduct. *In re Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961) (From the filing of a petition, "when the Board's processes have been invoked and a prompt election may be anticipated pursuant to present procedures, we believe that conduct thereafter which tends to prevent a free election should appropriately be considered as a postelection objection."). The Union filed the Petition on May 8. Elmore testified he and Goodman interacted with employees at the Fossil Ridge and Keller park-outs on April 13 and April 17. Either Koons or Harcrow greeted them at the park-outs in the afternoon, only after Elmore and Goodman loitered at the lots for several hours in the morning. The Hearing Officer should not weigh the impact the April encounters had on voters because these interactions took place at *least three weeks prior* to the petition filing. Interactions between the Union organizers and management could not possibly have had an impact on voters because the statements took place when no one anticipated a vote would even take place. The statements made between Elmore, Goodman, and Koons or Harcrow did not even involve the Union, voting, or any form of campaigning. The topic of conversation focused only on the Union's trespass and interference with safe operations.

2. The Employer did not surveil employees.

These interactions cannot possibly rise to the level of "surveillance" required to sustain an objection. *Needham Excavating, Inc.*, 371 NLRB at 23. An employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance unless there is something "out of the ordinary" about the observation. *See Sprain Brook Manor Nursing Home, LLC*, 351 NLRB No. 1190, 1190-91 (2007). To determine whether the observation is out of the ordinary, and thus coercive, the Board considers the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005).

Elmore and Goodman did have an interaction with Harcrow on May 8 in the early morning[6], but—as Elmore testified—the interaction was "very brief…maybe a minute, tops." (Tr. 71). Harcrow also approached them "on the other side of the building...in the very, very back" of the lot, far away from the main area. (Tr. 75). Elmore testified that no more than four employees witnessed the interaction. The likelihood that more employees witnessed the interaction in the far, remote area of the lot is slim to none, thereby rendering the material effects of this interaction non-existent.

As to the remaining interactions, each time a manager approached them, Elmore and Goodman had already visited a park-out in the morning for a few hours, left, then returned in the afternoon. They spoke to employees at the park-out in the mornings. It is highly likely that an employee alerted Harcrow and Koons to the Union's presence at the park-outs and it is reasonable

[6] As stated in the Statement of Facts, it is unclear from the record what time the Union filed the Petition on May 8. If this interaction took place prior to the Petition filing, then this interaction is arguably outside of the critical period. In any event, the Union, which is charged with the burden of proof with respect to all its objections, was in the best position, as the filer of the petition, to provide record evidence of the exact time of the petition's filing. The Union, however, introduced no such evidence and its failure to do so can and should be taken as an adverse inference that the events of May 8, upon which the allegations rest, occurred before the petition was filed.

for them to believe the Union was trespassing. *See Kindred Healthcare, Inc.*, 28-RC-6644, Regional Director Decision, 2009 BL 420902 (2009) (finding it reasonable that management would observe organizer given that earlier in the morning, the manager believed the organizer was trespassing on the employer's property).

The Employer had equal safety concerns surrounding the Union's interaction with drivers while driving buses necessitating management's presence. Lane emailed a brief summary of these safety concerns to the Union. (Jt. Ex. 14). Due to these safety concerns, Koons and Harcrow deployed to the park-outs in order to ensure the afternoon routes went smoothly, and all drivers and children were safe. In today's political climate, monitoring safety is of the utmost concern to the Employer who drives small children to and from school.

Finally, throughout the entirety of Elmore's testimony, he stated an approximate total of nine employees witnessed the April 13 and April 17 incidents: five on April 13, and four on April 17. None of the employee-witnesses fully observed the interactions. Seeing as the Union lost the election by 87 votes, nine "yes" votes could not swing the election in the Union's favor.

3. CJ is not a supervisor and did not surveil employees.

Although not directly addressed in this Objection, the Union introduced the actions of a Shop Supervisor named CJ during the Hearing. To the extent CJ's actions constitute surveillance—they do not—the Union did not prove CJ was a supervisor, and his actions cannot be attributed to the Employer.

Short testified that approximately three weeks prior to the election, CJ began walking onto Short's bus or standing in the stairwell to see how things were going. Short claimed CJ had never done this before. Short also testified that CJ sat by him at the picnic tables twice, also out of the ordinary.

First, CJ did not watch Short while he engaged in Union activity. CJ asked him how things were going on the bus a handful of times. They did not discuss the Union. Then, CJ chatted with Short at the picnic tables. It just so happened that during those times, Short was in the process of organizing a private driver and monitor Facebook group—evidently a generic employee group having nothing to do with the Union. Two other employees sat with them silently eating lunch. The picnic table get-together was completely uneventful. CJ did not interact with Short while Short was in the process of engaging in Union activity. Perhaps these subjectively odd and out of the ordinary interactions were CJ's way of trying to be friendly with his co-worker.

Second, CJ's conduct did not materially affect Short. CJ's stops by Short's bus and his conversations with him at the picnic table were isolated in nature. They did not relate to union activity, and they did not occur more than a handful of times. These infrequent and sporadic interactions did not involve Short's exercise of Section 7 rights. As discussed below, Short was an "adamant" Union supporter who exercised his right to vote in the election. (Tr. 182;172). Any effect CJ's "chitchat" had on Short was minimal at best, but more than likely non-existent. There is zero evidence in the record that CJ's alleged surveillance affected any other employees.

Third, even if CJ's actions constitute "surveillance," the surveillance is not attributable to the employer because the Union did not prove CJ to be a supervisor. The Act defines a supervisor as one "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if … the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). Thus, individuals are statutory supervisors "if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their exercise of such

authority is not merely of a routine or clerical nature, but requires use of independent judgment, and (3) their authority is in the interest of the employer." *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001). The burden of proving someone is a supervisor is on the party asserting it. *Int'l Bhd. of Elec. Workers v. Nat'l Labor Relations Bd.*, 973 F.3d 451, 457 (5th Cir. 2020).

Based on Short's limited understanding, Short believed CJ had authority to "write him up" regarding care and maintenance of his bus. (Tr. 173). However, he has no personal knowledge of CJ's disciplinary authority, and no other employees told Short that CJ disciplined them. Short did not clarify whether this "write up" was an effective recommendation of discipline or a mere note in the file passed along to the Employer. It is also not clear whether the issuance of this discipline requires the use of independent judgment.

Short could not confirm CJ's *actual* authority, only his *subjective belief* as to his authority. The Union did not present any concrete evidence of CJ's supervisory status, and therefore, failed to meet its burden.

B. Objection 4: During the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by threatening worse working conditions, loss of benefits and the loss of the Employer's contract with Keller I.S.D. if employees voted in favor of union representation.

The Employer did not threaten employees with worse working conditions, loss of benefits, or loss of the contract with Keller ISD. The Act does not protect employers who threaten "reprisal or force of promise of benefit." 29 U.S.C. § 158. An employer violates the Act when they communicate to employees that they will certainly lose benefits and wages currently enjoyed. *Eldorado Tool, Division of Quamco, Inc.*, 325 NLRB 222, 235 (1997) (employer threatened loss

of benefits when he stated the employees would "have nothing, no insurance, no dental, no vacation, no raises, no benefits, nothing," if the union came in).

A threat of worse working conditions is a "threat to diminish, however slightly, the quality of employee working conditions should employees select the Union," and interferes with employee free choice. *United Artists Theatre Circuit*, 277 NLRB 115, 121 (1985) (finding the statement: "if the Union came in, attendance policy would deteriorate to employees' detriment" to effect employee sentiment regarding the decision to support or oppose the union). "When an employer categorically states…that discipline will be enforced more stringently if a union is selected, without referring to the possibility of gains and losses through the collective-bargaining process," the statement constitutes one of worse working conditions and violates the Act. *Kroger Co.,* 342 NLRB 202, 213 (employer violated the Act when it told employee he would have to "'write her up' for failing to clock out" if employees selected the union as their bargaining representative).

The Union did not present any evidence the Employer ever mentioned or threatened "worse working conditions," or a loss of benefits. Indeed, the record does not present any facts logically connected to this allegation. Instead, the record reveals the Employer merely offered a comparison of the results of the Union's recent negotiations, clearly demonstrating to its employees they were doing quite well in Keller without the Union's "help."

1. The Employer's benefits comparison was lawful.

The Employer did address benefits during its May 9, 17, and 23 meetings. At the May 9 meetings, Koons compared the benefits the Lewisville bargaining unit employees received with the benefits the employees at the Keller location received. As stated above, the Lewisville CBA covers both drivers and monitors, and particularly resonates with the drivers and monitors at Keller ISD. During the May 17 meetings, Lane presented more information about the Lewisville CBA—

a legally binding contract covering employees at the Lewisville location. Koons then presented another overview of these facts during the May 23 meeting.

The Board has long held that an employer can lawfully compare its represented employees' wages and benefits with those of unrepresented employees. *Suburban Journals of Greater St. Louis*, 343 NRLB 157, 159 (2004); *Langdale Forrest Products Co.*, 335 NLRB 602 (2001). Comparing and contrasting these benefits by presenting excerpts from an existing collective bargaining contract falls clearly within the Employer's established rights under the Act. The Union seems to confuse a threatened loss of benefits with a factual comparison demonstrating that their existing benefits compared favorably to what the Union was able to achieve at the bargaining table in a nearby bargaining unit. The Employer's point was not that it would unlawfully interfere with the Union if it was elected to represent the employees. Its simple point was that the Union was unnecessary and less effective than what the Keller employees were able to achieve without Union representation.

2. The Employer did not author the Poster and language contained within it cannot be attributed to the Employer.

The Union admitted evidence of the Poster which appeared on a bulletin board in the Main Lot, across from the time clock, and away from the breakroom. The Poster contained the statement: "City of Keller may cancel the Entire Contract if a Union in place." (Pet. Ex. 11).

The Employer did not create or post the Poster. The Union did not present evidence to the contrary. The Union attempted to argue the Poster must belong to the Employer because Employees discovered it on the Employer-monitored bulletin board across from the time clock; Employer policy prohibits employees from posting unauthorized materials. The Union's argument is flawed for myriad reasons.

First, the Employer did not historically post any campaign materials on the bulletin board. The Employer either: (1) mailed materials to Employees; or (2) left materials in the office buses or near the time clock to be picked up by Employees. No witnesses testified to seeing any other materials on the bulletin board.

Second, the bulletin board is not enclosed in a glass case or covering. Anyone could theoretically post something on the board without the Employer's knowledge.

Third, the Poster does not resemble the Employer's previous campaign communications which all have Texas Central School Bus letterhead. The Poster is also riddled with typos and the writer drafted it in a casual tone. None of the previous handouts had any typos and are much more formal.

Fourth, neither O'Neil nor Short testified that the first time they saw the poster was on the bulletin board. In fact, they both testified they received the Poster from alternative sources. O'Neil testified she heard about the Poster from other employees, and employees who passed through the building texted her photos of the Poster. Short testified he received a copy of the Poster from another driver. The Employer did not practice these distribution methods when disseminating previous campaign materials. The Poster is bizarre compared to the other campaign materials.

Fifth, the isolated statement that "City of Keller may cancel the Entire Contract if a Union in place" appears to be the opinion of the unknown author. Even if this was accurate, it is unclear what consequence—if any—cancelling the "Entire Contract" between the City of Keller and Texas Central would have on the proposed bargaining unit. Based on record evidence, cancelling this "Contract" did not seem to have any impression or material effect on voters.

3. The Employer's failure to remove the Poster is not objectionable conduct.

The Employer's failure to remove the Poster on the date of the election is not objectionable conduct warranting a re-run. The Employer did not have knowledge of the Poster. In fact, Short testified management did not necessarily pass around the poster because he did not "know where the original version came from." (Tr. 169). O'Neil also did not have any idea who prepared the flyer. The only testimony even remotely attesting to the Employer's awareness of the Poster may be Munoz's. Munoz testified she saw Lane in the building on election day. She did not testify she saw Lane near the bulletin board, and in fact, she did not pass the bulletin board that day. Even this does not place him in the vicinity of the Poster.

Even if the Employer knew of the Poster and its whereabouts, leaving the poster hanging on the day of the election is not objectionable in and of itself. While electioneering "at or near the polls" may be considered objectionable conduct, it must be considered in context. *Boston Insulated Wire & Cable, Co.*, 259 NLRB 1118 (1982). The Board considers the nature and extent of the electioneering, whether it occurred within a designated "no electioneering" area, whether it occurred contrary to the instructions of the Board agent, whether a party or nonparty to the election engaged in it, and whether a party to the election objected to it. *See Del Rey Tortilleria, Inc.*, 272 NLRB 1106, 1107-1108 (1984), enf'd 823 F.2d 1135 (7th Cir. 1987).

As explained, the poster hung on the bulletin board in a hallway—a substantial distance from the breakroom. Employees did not have to pass the bulletin board to get to the breakroom, and many did not.

The Union—the only Party that knew of the Poster—did not inform the Board Agent or the Employer of the Poster. In fact, it would seem that the Union left it untouched intentionally. O'Neil first learned of the Poster in early May. Short received a copy of the Poster on May 17 and

texted Elmore a photo of it. Elmore became aware of the Poster on at least May 17. He did not address the Poster with the Employer. Then, Short received a photo of the Poster posted on the bulletin board about two or three days prior to the election. The Union—again—missed their opportunity to inform the Employer about the Poster. Then, on the morning of the election, O'Neil—who served as the Union's election observer—passed by the bulletin board and saw the poster. The Union—once again—did not object to its presence. The Union had an obligation to object to the Poster that day, but they chose silence. Therefore, the Board Agent could not instruct the Employer to remove it or remove it themselves. The Union evidently did not object to the Poster until it filed the present Objections.

The Regional Director overruled an objection in an analogous situation to this one. In *New Albertson's Inc.*, Regional Director Decision, 27-RD-1212, 2008 BL 401554 (2008), the union left a pro-union flyer posted to a bulletin board right above the time clock in the same room as the election. *Id.* at *7. The union posted the flyer the day before the election. *Id.* The employer had knowledge of this and did not object until after the election concluded. *Id.* at *8. The employer alleged the union engaged in objectionable electioneering on the day of the election. *Id.* The Regional Director disagreed. The Regional Director explained:

> It is undisputed that the pro-union flyer remained posted during the voting and near the voting booth, which would be considered part of the area "at or near the polls" and is therefore part of the no-electioneering area. It was posted by representatives of the Union prior the election, but with acquiescence of the Company. It was not posted contrary to the instructions of the Board agent, because no one raised this issue with the Board agent, and there is nothing in the record to suggest that the Board agent was even aware of the flyer's posting. No evidence was presented that any employee made comments about the flyer during the election, or noticed it during the voting. It is undisputed that the Employer's representative, Jose Rosario, was present at the pre-election conference, had full knowledge of the posting of the flyer, and even indicated to the Union representative on the day prior, that the posting of the flyer "may be an issue" at the election. Rosario failed to raise the issue with the Board Agent, and the Employer did not present Rosario to testify to offer an explanation.

Id. at *8.

The facts here are nearly identical, except this time, there is no evidence the Employer prepared or was even aware of the Poster, and the Union, with full knowledge of the Poster to which it now objects, failed to take appropriate action and, per *New Albertson's, Inc,* must be found to have acquiesced to the posting.. The Union "may not complain about it now." *New Albertson's Inc.*, 2008 BL at *8 (citing *Del Rey*, 823 F.2d at 1141, n. 2).

Further, any effect the Poster had on voters is *de minimus*. According to O'Neil, the Poster was posted in early May, meaning employees had the opportunity to see the poster for approximately 25 days. Viewing the poster for a 26th day would have no material effect on employee free choice. The information would not have come as a shock to voters on the day of the election, and again, it is not clear how many employees viewed the Poster.

C. Objection 5: During the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by telling employees negotiations would be futile.

Based on the Union's insufficient case-in-chief, it is extremely unclear as to what statements the Union believes fall into this category. In fact, the Union did not present one single Employer statement insinuating, "negotiations would be futile." To the extent the Employer can decipher the meaning of this Objection, it will address the legality of certain statements.

An unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means. *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002). When the employer states "either expressly or by clear implication, that it would not bargain in good faith with the union even if it were selected by the employees," the Board will find the employer created "in the minds of employees the futility of selecting a bargaining representative." *Am. Greetings Corp.*, 146 NLRB 1440, 1445 n.4 (1964) (finding no threat of futility where the

employer disseminated "temperate and factual" messaging concerning three past union strikes, and the union had full opportunity to correct any half-truths, but did not); compare *Douglas Emmett Management, LLC*, 370 NLRB No. 92 (2021) (finding the employer's statement that the company would never agree to or sign a union contract that provided better health or other benefits to them than what the company already provided to non-union employees was futile); *Health Care and Retirement Corp. of America*, 307 NLRB 152, 158 (1992) (finding the employer's statement that "the Union could not do anything for the employees, that they would start from 'ground zero' and that the Respondent would never give more to a union facility than to a nonunion facility" to be futile). Threats are not viewed in isolation. *KSM Industries*, 336 NLRB 133 (2001) ("The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce."). The Employer did not make any express statements that they would not bargain in good faith with the Union. Employer statements did not relate to the futility of negotiations, but rather, the Employer's view of the effects of unionization based on its experience and existing legal documents.

While the Employer does not believe the discussion surrounding the Illinois Cooperative Agreement even slightly implicates futility, it believes the Union may attempt to argue otherwise. The Employer also cannot identify any express statements in the record regarding the Employer's refusal to bargain in good faith. To the contrary, in its employee meeting and written contract, the Employer repeatedly informed the employees that it supported their right to choose. Based on the lack of evidence and the Employer's anticipation of the Union's argument, it addresses the agreement here.

At the May 17 meetings, Lane elaborated on the Illinois Cooperative Agreement. Lane copied and pasted sections from the agreement onto the PowerPoint slides and read them verbatim.

Then, Lane provided examples where the union requested employees be discharged because of their failure to pay dues. While O'Neil did not find this presentation to be "fair," the presentation of actual events is perfectly legal. O'Neil's subjective interpretation is not relevant to the statements' legality. *Picoma Industries*, 296 NLRB 498, 499 (1989) ("[S]ubjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.").

Lane also explained that should the employees vote for the Union, the Illinois Cooperative Agreement would apply to them. This reflects Lane's understanding based on the agreement's explicit terms stating its coverage extends to any location represented by the Union. The agreement itself explicitly states: "locally negotiated conditions generally will be narrowly limited in scope," meaning that any location represented by the Union will have next to no bargaining power. (Er. Ex. 1; Jt. Ex. 12). Lane *merely reiterated exactly* what the agreement stated.

Lane also stated, "You will be part of 'one (1) bargaining unit' which all be (sic) guarantees you will be prevented from ever voting out the Teamsters." (Er. Ex. 1; J. Ex. 5). However, this quote must not be read in isolation. *KSM Industries*, 336 NLRB at 133. This comment appeared on the PowerPoint immediately preceding a discussion about the sheer volume of employees included in this one bargaining unit. According to the agreement, 14 locations currently fall under this agreement, meaning more than just Keller ISD employees would have to vote to decertify the Union. Coordinating and discussing these issues with such a massive group would be virtually impossible; Lane reasonably believed this to be true.

Finally, to cure any confusion regarding the Illinois Cooperative Agreement, Lane explained Texas's Right to Work law. (Er. Ex. 1). He explained, "mandatory membership in the union cannot be part of the CBA." (Er. Ex. 1). This statement should have cured any confusion over the potential coverage of the agreement.

Even if the statement did not alleviate concerns, and even if Lane did not answer employee questions regarding the agreement to the employees' liking, Lane made the statement roughly eight days in advance of the election. Eight days left the Union with an ample opportunity to respond to these statements if they believed them to be inappropriate. However, the Union did not present evidence that it responded to the statements or cured facts they believed to be misleading. *See NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945 (6th Cir. 2000) (holding employer did not threaten employees when CEO made improper statement because he explained himself, the time of the statement was far in advance of the election, and the union had ample opportunity to respond).

Evidently, the statements did not affect voter free choice, and had no material effect on the election. 243 employees voted, and of the two that testified for the Union, both voted. O'Neil and Short testified that they exercised their rights and were able to vote for who they wanted to vote for. (Tr. 128, 129; 172).

VI. CONCLUSION

The Union's Objections are wholly frivolous, and do not specifically address the conduct to which it believes to be objectionable. The Union bears a high burden to produce proof that objectionable conduct occurred, and if so, that the conduct materially affected the results of the election. The Union's burden is even higher in this case because the election was not closely decided. For the reasons set forth above, the Union has not come close to meeting its burden. The Union's Objections should be set aside.

Respectfully submitted,

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Dated: July 13, 2023

CERTIFICATE OF SERVICE

I certify that, pursuant to Section 102.114 of the Board's Rules and Regulations, on this 13th day of July, 2023, I caused a copy of *North American Central School Bus's Post-Hearing Brief* to be served on the following:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIXTEEN

NORTH AMERICAN CENTRAL SCHOOL BUS

Employer,

and **Case No. 16-RC-317560**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 997

Petitioner.

PETITIONER'S POST-HEARING BRIEF IN SUPPORT OF ITS OBJECTIONS TO THE ELECTION

Petitioner, International Brotherhood of Teamsters, Local Union 997 ("Local 997" or "the Union" or "the Petitioner") files this its Post-Hearing Brief in Support of its Objections to the Election. As will be shown below, the below-identified conduct attributable to the Employer, North American Central School Bus ("the Employer" or "the Company"), destroyed the requisite laboratory conditions which should have governed; threatened, restrained, and coerced election unit employees; and affected the results of the election.

I. INTRODUCTION

Based on a petition filed on May 8, 2023, and pursuant to a Stipulated Election Agreement, an election was conducted on May 25, 2023 to determine whether a unit of employees of the Employer wish to be represented for purposes of collective bargaining by the Petitioner. That voting unit consisted of all full-time and regular part-time drivers and monitors employed by the Employer at its facility at 11300 Alta Vista Road. The tally of ballots prepared at the conclusion of the election showed that of the approximately Three hundred and thirteen (313) eligible voters,

seventy-eight (78) votes were cast for and one hundred and sixty-five (165) votes were cast against the Union. Thus, a majority of the votes counted was not cast in favor of the Union. *Bd. Ex. 1(c).*

After the vote tally, the Regional Director concluded that the evidence submitted by the Union in support of its election objections could be grounds for overturning the election if introduced at a hearing. Accordingly, in accordance with Section 102.69(c)(1)(ii) of the Board's Rules and Regulations, the Regional Director ordered that a hearing be held before a Hearing Officer for the purpose of receiving evidence to resolve the issues raised by the objections. The hearing on Local 745's election objections was held on June 28, 2023. *Bd. Ex. 1 (d).*

II. OBJECTIONS

Petitioner filed the following Objections to the Election on June 2, 2023:

1. Both immediately before and during the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by surveilling employees while they were engaged with the Union organizers.
2. Both immediately before and during the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by interrogating and polling employees about their support for the Union.
3. Both immediately before and during the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by terminating two known Union supporters.
4. During the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by

threatening worse working conditions, loss of benefits and the loss of the Employer's contract with Keller I.S.D. if employees voted in favor of union representation.

5. During the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by telling employees that negotiations would be futile.

6. During the critical period, the Employer, through its representatives and agents, unlawfully threatened, restrained, and coerced election unit employees by stating and implying that the Union was creating an unsafe work environment.

Prior to the commencement of the hearing, the Union withdrew Objection No. 3. *Tr. 9.* After the presentation of evidence, Petitioner withdrew Objection No. 2. *Tr. 199.* After analyzing the transcript and evidence, Petitioner hereby withdraws Objection No. 6. Thus, this Brief addresses only Objection Nos. 1, 4, and 5. These objections generally relate to the Employer's threats, restraints, and coercion of unit employees that (a) the employees would have better working conditions and compensation if they voted against union representation (b) the employees would have worse working conditions and compensation if they voted in favor of union representation, (c) the employees were likely to lose their existing working conditions, wages, and benefits if the Union was voted in. Additionally, the objections raise issues regarding the Employer's false statements regarding facts and law as well as improper surveillance of employees that is a violation of Section 8(a)(1) of the Act which is another independent basis to invalidate the election.

III. STIPULATIONS

The parties stipulated that the following individuals are Section 2(11) supervisor within the meaning of the National Labor Relations Act:

1.	Ken Harcrow	Contract Manager
2.	Jim Koons	District Manager
3.	Keith Lane	Vice President, Human Resources

Tr. 12-14.

IV. STATEMENT OF FACTS

A. The Company.

The Employer, North American Central School bus, is a corporation with a place of business located at 11300 Alta Vista Road, Keller, Texas 76244. The employer provides passenger transportation services for Keller ISD. *Stipulated Election Agreement, Bd. Ex. 1(b), p. 1.*

B. The Commencement of the Campaign and Management Hostility to It.

The Union commenced its efforts to organize the employees in April 2023. *Tr. 40-41.* The union sent Michelle Goodman and Cuyler Elmore, International field organizers, to execute the organization efforts. *Id.* The initial effort started at the Fossil Ridge park-out on April 13. *Tr. 43-47, 56-57.* The organizers made their presence known to the workers, including giving them literature and explaining what they were trying to accomplish for them. *Tr. 46-47.* The organizers were at the Fossil Ridge park-out talking to drivers in the morning and in the afternoon. *Tr. 47.* The organizers encountered no managers in the morning. *Tr. 47-48.*

Jim Koons was present at the Fossil Ridge park-out during the afternoon. *Tr. 48.* That was the very first time that a driver saw him at that location. *Tr. 146-48.* Koons told Goodman and Elmore that they could not be there and that they were trespassing. *Id.* In response, Elmore told Koons that the Keller Ridge park-out was public property and that Koons could not trespass them on public property. *Id.* They went back and forth, with Koons telling the organizers that they had

to leave. *Tr. 48-49.* This culminated in an argument between Koons and the organizers when he kept insisting that it was private property and that the organizers could not be on the grounds. *Id.* At least five drivers witnessed this interaction. *Tr. 49-50; Pet. Exs. 1-3.*

The next day, the organizers went to the Keller High School park-out to engage with the employees. *Tr. 51-52.* Once again, there were no managers when the organizers were at the Keller park-out in the morning. *Tr. 52.* Upon their return in the afternoon, Harcrow approached them at an excessive rate of speed in his car. *Tr. 53-55; Pet. Ex. 6.* Similar to the encounter with Koons the day before, Harcrow told them that they could not be there and that they were trespassing. *Tr. 53-55.* Harcrow even threatened to call security to have them removed from the property. *Tr. 55-56.* This time, two employees witnessed this incident. *Tr. 56.*

On April 17, the organizers went to the main lot at Keller High School to do more engagement with the employees. *Tr. 60-63; Pet. Exs. 7 and 8.* Shortly after they arrived, Harcrow appeared on the scene and stared at the organizers as they interacted with the employees. *Id.* As far as Elmore could see, Harcrow was there for no other purpose than to monitor the organizers' and employees' interactions. *Id.*

C. The April 17 Staff Meeting.

On April 17, Koons called a staff meeting with the full-time non-driver employees to discuss the union organizing campaign. *Tr. 80-82.* Among the things that Koons discussed was that they were going to "squash the union." *Tr. 83.*

D. Company Letters to Employees Leading Up to the RC Petition.

Starting on April 17, the Company distributed multiple letters to employees regarding the Union organizing campaign and the pending election. The first letter was sent on April 17. *Tr. 95-96; Jt. Ex. 1.* In this letter, management, via Koons and Harcrow, stated the following:

> We pledge not to attack the Teamsters or make disparaging comments about the union or their paid representatives.
> *Tr. 96-97; Jt. Ex. 1.*

On April 20, the Company placed a letter on the buses for drivers to read regarding an assault on one of the drivers the night before. *Tr. 97-99; Jt. Ex. 2.* The letter contained a statement that accused the Union of "attempting to use this tragic event to further their goals." *Tr. 99-100; Jt. Ex. 2.*

E. The May 8 Incident of Management Hostility.

On May 8, the organizers were present at the municipal or overflow lot talking to employees. *Tr. 71.* Harcrow was in a rage and yelled at the organizers that they needed to leave and that they were trespassing. *Id.* Harcrow's rage at the organizers was done in front of drivers. *Tr. 71-72.* In fact, a driver who was talking to the organizers immediately left once he saw Harcrow aggressively approaching. *Tr. 73.*

F. The Company's May 9 Meeting Regarding the Election.

On May 9, Koons had meetings with the employees regarding the Union organizing campaign and the upcoming election. *Tr. 101-02, 154-56, 185-86; Co. Ex. 2.* One of the main parts of the presentation was a "comparison" of the Lewisville Teamsters contact versus the existing Keller pay, benefits, and working conditions. *Tr. 154-56, 189; Co. Ex. 2.* Koons' power point mentioned "guaranteed hours," and concluded that "Keller Union-Free" had a greater hour guarantee. *Tr. 189-90; Co. Ex. 2, pp. 6-12.* Koons admitted on cross examination, however, that the "guarantee" in Lewisville was a legal contractual obligation while the Keller location was not a contractual legal obligation that could be unilaterally changed at any time. *Id.* The Koons presentation noted how Keller had better terms than Lewisville for holidays, holiday pay, bereavement leave, jury duty, and wages. *Id.* Like "guaranteed" hours, all of the pay and benefits

in Keller were not contractual and management could unilaterally change them at any time. Koons' power point failed to mention this vitally important fact. *Tr. 190-91; Co. Ex. 2.*

During the meeting, one of the drivers, Cheri O'Neil, asked Koons a question that challenged the logic of the Company's position of not wanting the Union voted in at the Keller location. *Tr. 104.* O'Neil asked Koons if the pay and benefits are lower in Lewisville with a union contract, it would be better for the Company to allow the Union in Keller. *Id.* O'Neil never got a straight answer from him. *Id.*

Michael Short, a driver employee, recorded the May 9 meeting by audio. *Tr. 158-59.* Short then posted the audio with a slide show of clown images on YouTube. *Tr. 161.*

G. The May 11 Letter to Employees.

As a follow-up to the May 9 meeting, Koons and Harcrow sent a letter to employees on May 11. *Tr. 101; Jt. Ex. 6.* In this letter, management essentially accused the Union of lying about having majority status. *Tr. 102; Jt. Ex. 6.* The letter also referenced that there would be an adversarial relationship that would be brought into the employees' working conditions and workplace environment, whereas there would be "teamwork, trust, respect, cooperation, safety, and customer focus without the Union. *Jt. Ex. 6.*

H. The Company's May 17 Meeting Regarding the Election.

On May 17, Keith Lane conducted meetings with employees regarding the election. *Tr. 105; Co. Ex. 1.* In this meeting, Lane stated that "the Teamsters organizers secretly recorded and photographed our meetings and those in attendance." *Tr. 162; Co. Ex. 1, p. 3.* That statement is false. Short immediately corrected him to say it was him who recorded the audio. *Tr. 162*. Lane also said that "the Teamsters organizers portrayed Jim Koons publicly in a derogatory and offensive manner on YouTube by inserting various evil clown pictures over his voice." *Tr. 105;*

Co. Ex. 1, p. 3. Once again, Short said that he had done the posting of the video and was responsible for the insertion of the clown faces. *Tr. 105-07, 161-62.* Despite this direct admission that an employee had done the posting on YouTube, Lane continued to state in subsequent meetings that day that the Teamsters organizers had done it. *Tr. 105-07, 164-65.*

Lane also stated in the May 17 meetings that the Union had already negotiated a collective bargaining agreement ("the Illinois Agreement") and that the Keller employees "did not get to have a voice or any representation at the table." *Tr. 107; Co. Ex. 1, p. 6.* Lane also mentioned that the Illinois Agreement states that if an employee does not pay his/her union dues, the Union could have him/her fired even if they meet performance standards. *Tr. 107-09; Co. Ex. 1, pp. 13-18, 21.* Lane even said that the Illinois Agreement meant that if the employees voted for the Teamsters, they would never be able to vote them out. *Tr. 109; Co. Ex. 1, p. 21.*

I. The May 17 Letter to Employees.

As a follow-up to May 17 meetings, Lane sent a letter to the employees on that same day. *Tr. 105; Jt. Ex. 5.* In Lane's letter, he repeated the knowingly false allegation that "the Teamsters organizers….secretly recorded our meetings last week and then uploaded the recordings to YouTube." *Tr. 105-07; Jt. Ex. 5.* Lane also referenced the Illinois Cooperative Agreement as being already negotiated "that will cover you through at least 2027." *Tr.107-08; Jt. Ex. 5.* Lane also stated in the letter that the Illinois Agreement would automatically cover the employees "without the chance to vote on it or help negotiate the language." *Id.* He further repeated the false assertions that the employees "will never be able to vote out the Teamsters if you want to" and that the Teamsters "will request good employees be fired for not paying union dues, fees, fines, and assessments." *Tr. 108-09; Jt. Ex. 5.*

J. Management Posting Before the Election.

On May 22, just three days before the election, management posted another letter regarding the election. *Tr. 114-15; Pet. Ex. 10.* In this letter, Koons continued the assertions that Lewisville (with a union contract) was worse than Keller, the Illinois Agreement would be forced on the Keller employees, Teamsters will force the Company to fire employees for non-payment of union dues, the employees will never be able to vote the Teamsters out, and the Teamsters organizers both recorded a meeting and posted the recording on YouTube. *Tr. 114-18; Pet. Ex. 10.*

K. Bulletin Board "Vote No To Union" Flyer.

A document entitled "Vote No To Union" was posted on the bulletin board at the Keller location where the vote occurred. *Tr. 119-21; Pet. Ex. 11.* It was posted on a bulletin board that only has work-related postings and the Employer does not allow employees to post there without permission from management. *Tr. 122-25.* The flyer had been on that board since the beginning of May and was there on the day of the vote on May 25. *Tr. 119-21.* Cheri O'Neil, an employee, saw it when she went to vote. *Id.* Short first saw the flyer on May 17 in hard copy form away from the bulletin board. *Tr. 168-69.* Short then saw a text with a picture of the flyer on the bulletin board on May 22 or 23. *Tr. 169-70.*

This flyer contained numerous falsehoods and threats in comparing current benefits with a union contract, including but not limited to (1) claiming that employees in a union setting can be fired without explanation, (2) asserting a non-binding benefit of having more "guaranteed" hours without a union, (3) questioning whether employees could receive unemployment compensation for summer breaks with a union contract, (4) claiming that all drivers will have to pay union dues, (5) maintaining that employees would have no health insurance with a union, (6) asserting there will be no pay raises with a union based on unknown American Airlines union who is allegedly

on strike, and (7) alleging that Keller may cancel the entire contract with the Company if the union was voted in. *Id.*

Company management never discussed the flyer or addressed the contents of the flyer and it being on the Company's bulletin board. *Tr. 170.* The Company never disavowed the contents of the flyer. *Id.*

L. Management Wore "Vote No" Buttons.

On the day before the election, Koons and Lane were wearing "Vote No" buttons in the plant. *Tr. 65.*

M. Keller ISD Security Entered the Voting Location During the Election.

A security guard for Keller ISD entered into the voting location during the election, and wanted to know why the cameras in the breakroom were not working. *Tr. 67-68, 125-26.* The NLRB agent told him that they were having an election and that the cameras could not operate during the election. *Tr. 68-69, 125-26.*

V. ARGUMENT AND AUTHORITIES

A. NLRB Law Regarding Election Objections Based on Employer Conduct.

In cases raising allegations of preelection campaign interference, the Board generally addresses three questions: (1) whether the individuals alleged to have engaged in objectionable conduct were agents of either party (i.e., whether the conduct is attributable to one of the parties); (2) whether the conduct itself is objectionable misconduct; and (3) if the conduct is deemed objectionable, whether it warrants invalidating the election because it is "more than de minimis with respect to affecting the results of the election." See, e.g., *Mercy General Hospital*, 334 NLRB 100 (2001).

In *General Shoe Corp.,* 77 NLRB 124, 127 (1948), the Board held that conduct which

creates an atmosphere which renders improbable a free choice will warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. In *General Shoe*, although the employer's activities immediately before the election were held not to constitute unfair labor practices, certain of these activities were nonetheless found to have created "an atmosphere calculated to prevent a free and untrammeled choice by the employees." *Id.* at 126. The Board reasoned as follows:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.
> *Id.* at 127.

The test to determine if there was "an atmosphere calculated to prevent a free and untrammeled choice by the employees" is an objective one: whether the party's misconduct "has the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995); see *Hopkins Nursing Care Center,* 309 NLRB 958 (1992); *Baja's Place,* 268 NLRB 868 (1984); see also *Jurys Boston Hotel,* 356 NLRB 927, 928 (2011) (expressing test as whether conduct "could . . . reasonably have affected the results of the election").

In determining whether misconduct has the tendency to interfere with freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit

employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division,* 336 NLRB 157, 158 (2001) (citing *Avis Rent-a-Car,* 280 NLB 580, 581 (1986)); see *Cedars-Sinai Medical Center,* 342 NLRB 596, 597 (2004); *Phillips Chrysler Plymouth,* 304 NLRB 16 (1991).

B. Objection No. 4: The Employer's Threats and Comments in This Case are Sufficient to Set Aside the Election.

In the present case, the Union established that the Employer, in both organized group meetings and in written communications with the Keller employees, created "an atmosphere calculated to prevent a free and untrammeled choice by the employees." *General Shoe Corp.,* 77 NLRB at 126.

The Company consistently threatened employees with completely changing (for the worse) the compensation, hours, and benefits of the Keller employees if they voted in favor of union representation. There were multiple occasions in which management had informed employees, verbally and in writing, they would get less in guaranteed hours, holidays, holiday pay, bereavement leave, jury duty, and wages if the union won the election. Of course, in the same meetings and writings, the Company representatives confirmed that the employees would continue to get better pay, benefits, and working conditions if the Union lost the election. The Employer hammered away at this message throughout the campaign to clearly scare the employees.[1]

In addition to the consistent messaging about worse compensation, benefits, and working conditions, the Employer made several other blatant threats and statements to the employees during the campaign, some of which were completely false. As discussed in the Statement of Facts

[1] These lesser items were all based on a totally separate CBA that was negotiated between a completely different local Teamsters union and a different ISD contractor in a different county in Texas.

section of this Brief, these threats included statements that (1) the Illinois Agreement would be forced on the Keller employees, (2) the employees would not be able to negotiate since the Illinois Agreement would already cover them, (3) Teamsters will force the Company to fire employees for non-payment of union dues, and (4) the employees will never be able to vote the Teamsters out.

The Board and the courts have frequently decided cases involving allegations that employer predictions of the consequences of unionization like the predictions/threats made in this case constituted objectionable threats. The lead case in this area is *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). The Gissel decision resolved two separate cases, one of which—NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968)—involved the court's affirmance of the Board's unfair labor practice finding (and consequent invalidation of an election) based on the employer's communication to employees that, the Board found, reasonably tended to convey the belief that selection of the union could lead to plant closure or other job loss.

Gissel clearly stands for the proposition that threats of retaliation are unlawful. For cases setting aside elections based on express or implied threats of retaliation without specific reference to the absence of objective evidence, see *Keystone Automotive Industries, Inc.,* 365 NLRB No. 60, slip op. at 1 fn. 2 (2017) (employer stated it would stop offering incentive program if union "infiltrated" and that all "little perks" would go away); *Labriola Baking Co.,* 361 NLRB No. 41 (2014) (Spanish translation of employer prediction of strike and replacement workers reasonably suggested it would use immigration status to take action against employees in event of strike); *Deaconess Medical Center,* 341 NLRB 859 (2004) (employer indicated it would not reverse wage cut if union won election); *Cooper Tire & Rubber Co.,* 340 NLRB 958 (2003) (employer reasonably suggested to employees they would be foreclosed from obtaining certain benefit if union represented them); *Georgia-Pacific Corp.,* 325 NLRB 867 (1998) (employer stated union

representation would make employees ineligible for bonus plan); *ADIA Personnel Services,* 322 NLRB 994 (1997) (employer implied it would not institute usual wage increase if union won); *Renton Issaquah Freightlines,* 311 NLRB 178 (1993) (employer linked reopening of plant to whether employees voted to decertify the union); *Hertz Corp.,* 316 NLRB 672, 672 fn. 2 (1995) (employer statements conveyed impression employees would lose 401(k) immediately upon choosing union); *Glasgow Industries,* 204 NLRB 625, 627 (1973) (one foreman told employee selection of union would lead to loss of work and another stated "if you all vote this Union in, this plant could move to Mexico"); *Sprague Ponce Co.,* 180 NLRB 281 (1970) (veiled threat to close plant if union was selected); *Petrochem Insulation, Inc.,* 341 NLRB 473 (2004) (stating, in setting aside election based on threat, that employer's clear implication that it would reduce wages and benefits if employees unionized "would not constitute a prediction of adverse consequences that was both beyond the Employer's control and based on objective fact"); *NLRB v. Taber Instruments,* 421 F.2d 642 (2d Cir. 1970) (enforcing order finding unlawful statement that employees did not realize what they could lose in election, as employer, if it chose, could phase out or move operations); *Penland Paper Converting Corp.,* 167 NLRB 868 (1967) (pre-Gissel case setting election aside based on veiled threat to close plant or take other economic sanctions if employees selected union).

The Board has held that an employer's conveyance of a sense of futility warrants setting aside an election if the employer's statements expressly, or through clear implication, convey that it will not bargain in good faith if the union is selected. See *Madison Industries,* 290 NLRB 1226, 1230 (1988); see also *American Telecommunications Corp.,* 249 NLRB 1135, 1136 (1980).

The above-referenced cases support a finding that the numerous threats that Employer representatives made to the employees constitute a violation of the employees' rights to have an

atmosphere free from threats, coercion, and intimidation and prevented a free and untrammeled choice by the employees.

C. Objection No. 4: The Employer's Express and Implied Promises of Better Hours, Pay, Working Conditions, and Benefits in this Case are Sufficient to Set Aside the Election.

The statements the Company representatives made regarding better hours, pay, working conditions, and benefits also violate Board law regarding express or implied promises of benefits if the employees voted against union representation. To determine if a statement is an implied promise of benefit, the Board considers the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise. See *Viacom Cablevision,* 267 NLRB 1141 (1983); *Crown Electrical Contracting, Inc.,* 338 NLRB 336, 337 (2002).

An employer may compare union and nonunion benefits and make statements of historical fact, but even such comparisons and statements may, "depending on their precise contents and context, nevertheless convey implied promises of benefits." *G & K Services,* 357 NLRB 1314, 1315 (2011); see *Keystone Automotive Industries, Inc.,* 365 NLRB No. 60 (2017) (employer linked expeditious wage increase to vote against union); Unifirst Corp., 361 NLRB No. 1, slip op. at 1 fn. 3 (2014) (employer specifically linked receipt of 401(k) and profit-sharing plans to voting against union); *Grede Plastics,* 219 NLRB 592, 593 (1975) (factually accurate letter contained implied promise); *Westminster Community Hospital, Inc.,* 221 NLRB 185 (1975), enfd. mem. 566 F.2d 1186 (9th Cir. 1977) (comparison contained promise).

The fact an employer is responding to employee questions does not necessarily excuse an actual implied promise. *California Gas Transport,* 347 NLRB 1314, 1318 (2006), enfd. 507 F.3d 847 (5th Cir. 2007). If an express or implied promise has been made, an employer's disclaimer it is making any promises is "immaterial." *Michigan Products,* 236 NLRB 1143, 1146 (1978).

The above-referenced cases support a finding that the numerous "comparisons" between the workplace with a union versus without a union constitute a violation of the employees' rights to have an atmosphere free from threats, coercion, and intimidation and prevented a free and untrammeled choice by the employees.

D. Objection Nos. 4 and 5: Management's Misleading Letters and Meetings Interfered with Employees' Freedom of Choice.

As already stated, the test in an objections case is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). In this case, the Company's presentations and letters blatantly interfered with the Keller employees' freedom of choice. The statements regarding the better pay, hours, benefits, and working conditions were bad enough as noted on pages 6-9, *supra.* This case, however, takes on a higher level of threats and promises when the Company started referencing the Illinois Agreement and the alleged "facts" that the Keller employees would automatically have such agreement as their CBA without being able to negotiate their own provisions for their location. These assertions of "fact" are quite obviously false in that Article 2 of the Illinois Agreement contains allowances for the parties to negotiate "economic provisions and local terms and conditions of employment," as well as "management rights clauses, grievance and arbitration provisions, assignment of work, and hours of work provisions." *Jt. Ex. 12.*

Although the Board's general policy is not to police false or misleading campaign statements, it nevertheless will find a valid objection if such statements are accompanied by a threat or promise. See *Midland National Life Insurance Co.,* 263 NLRB 127, 130 (1982). In the present case, the Company in no uncertain terms informed the employees that not only would negotiations be useless, but that there would be no opportunity for them to even be at the negotiating table. As previously noted, an employer's conveyance of a sense of futility warrants

setting aside an election if the employer's statements expressly, or through clear implication, convey that it will not bargain in good faith if the union is selected. See *Madison Industries,* 290 NLRB 1226, 1230 (1988); see also *American Telecommunications Corp.,* 249 NLRB 1135, 1136 (1980).

The misleading statements go even further when the Employer representatives told the employees that they would never be able to vote out the Union and that the Union could require the Company to fire employees based upon non-payment of dues. These are egregiously false statements in light of well-known decertification procedures for voting to decertify a union and the fact that the unit in Keller would be in a right-to-work state in which a bargaining unit member does not have to be a union member to continue to work for the employer.

Management made more false statements regarding the continued assertions that the Teamsters organizers were the persons responsible for both recording and posting the audio (with clown images) of Jim Koons speaking to the employees in a company-sponsored anti-union meeting. *See pp. 6-7, supra.* Despite specifically hearing an employee take responsibility for the YouTube posting, the Employer continued to blame the organizers.

E. Objection No. 4: The Employer's Continued Allowance of the Flyer on Its Bulletin Board is Sufficient to Set Aside the Election.

As addressed in Section K. of the Statement of Facts, a document entitled "Vote No To Union" was posted on the bulletin board at the Keller location where the vote occurred. It was posted on a bulletin board that only has work-related postings and the Employer does not allow employees to post there without permission from management. *Tr. 122-25.* The flyer had been on that board since the beginning of May and was there on the day of the vote on May 25 and seen by multiple employees.

This flyer contained numerous falsehoods and threats in comparing current benefits with a union contract, including but not limited to (1) claiming that employees in a union setting can be fired without explanation, (2) asserting a non-binding benefit of having more "guaranteed" hours without a union, (3) questioning whether employees could receive unemployment compensation for summer breaks with a union contract, (4) claiming that all drivers will have to pay union dues, (5) maintaining that employees would have no health insurance with a union, (6) asserting there will be no pay raises with a union based on unknown American Airlines union who is allegedly on strike, and (7) alleging that Keller may cancel the entire contract with the Company if the union was voted in. *Id.*

The above-referenced threats and promises clearly rise to the level of objectionable conduct as described in the cases cited on pages 13-14 of this Brief. Although it is unknown as to who was the actual author of the flyer, it is undisputed that it was posted on the Company's bulletin board in which it communicates to employees for a lengthy period of time, including on the day of the election in a place in which at least some employees walked past to enter their vote. It is also undisputed that Company policy prohibits employees from posting on the Company's bulletin board. At no time did the Employer ever remove the flyer from the board or disavow its contents.

F. Objection No. 1: Harcrow's Actions of Surveillance and Intimidation on May 8 Interfered with a Fair Election.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. Conduct which by statutory proscription constitutes unfair labor practice violations may be the basis for invalidating an election, if merit is found in the objections in which they are alleged. As the Board commented in *Playskool Mfg. Co.*, 140 NLRB 1417, 1419 (1963), "conduct of this nature which is violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise

of a free and untrammeled choice in an election." See also *IRIS U.S.A., Inc*., 336 NLRB 1013 (2001); *Diamond Walnut Growers*, 326 NLRB 28 (1998). This is so "because the test of conduct which may interfere with the "laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co*., 137 NLRB 1782, 1786–1787 (1962); see also *Overnite Transportation Co*., 158 NLRB 879, 884 (1966); *Excelsior Underwear, Inc*., 156 NLRB 1236, 1245 (1966).

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, "under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1276 (2005). Accord: [*1296] *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007). The standard is an objective one, based on the rationale that "employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257 (1993). Under this precedent, management's statements and actions violate Section 8(a)(1).

As a general rule, the period during which the Board will consider conduct as objectionable-- often called the "critical period"--is the period between the filing of the petition and the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275, 1278 (1961); see also *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246 fn. 13 (2014) (declining request to overrule *Ideal Electric*). It is the objecting party's burden to show that the conduct occurred during the critical period. *Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003); *Gibraltar Steel Corp.*, 323

NLRB 601, 603 (1997); *Dollar Rent-A-Car*, 314 NLRB 1089, 1089 fn. 4 (1994).

On May 8, the start of the critical period in this case, the organizers were present at the municipal or overflow lot talking to employees. Harcrow appeared at the lot, confronted the organizers, and was in a rage and yelled at the organizers that they needed to leave and that they were trespassing. Harcrow's fury at the organizers was done in front of drivers. In fact, a driver who was talking to the organizers immediately left once he saw Harcrow aggressively approaching.

The test for determining whether an employer has created the impression that its employees' union activities have been placed under surveillance is whether the employees would reasonably assume from the employer's statements or conduct that their union activities had been placed under surveillance. *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 963 (2004); *Flexsteel Industries,* 311 NLRB 257 (1993). Harcrow's actions on May 8 clearly show that the Company was monitoring the employees' protected concerted union activities.

In addition to the May 8 actions of Harcrow, there were several incidents of improper surveillance prior to the critical period that should be used in evaluating the Employer's conduct on May 8. Petitioner cited detailed surveillance activities in April that support the conclusion that the Employer violated the law when it monitored employees' activities on May 8. *See pp. 4-5, supra.*

Pre-petition conduct may also be considered where it "adds meaning and dimension to related post-petition conduct." *Cedars-Sinai Medical Center*, 342 NLRB 596, 598 fn. 13 (2004); *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67, 67 (2003); *Dresser Industries*, 242 NLRB 74, 74 (1979). While generally such prepetition conduct cannot, standing alone, be a basis for an objection, *Data Technology Corp.*, 281 NLRB 1005, 1007 (1986), the Board has found clearly

proscribed prepetition activity likely to have a significant impact on the election. See *Royal Packaging Corp.*, 284 NLRB 317, 317 (1987).

The evidence of management's surveillance actions during the critical period, combined with the pre-petition monitoring that went on at multiple locations, is sufficient to establish improper conduct on the Employer's part.

VI. CONCLUSION

There was consistent and constant messaging from the Employer that the Keller employees' (1) compensation, (2) hours, (3) benefits, and (4) working conditions would get worse if they voted in favor of the Union and would be better if they voted against the Union. The Employer's management made several other blatant threats to the employees during the campaign that (1) the Illinois Agreement would be forced on the Keller employees, (2) the employees would not be able to negotiate since the Illinois Agreement would already cover them, (3) Teamsters will force the Company to fire employees for non-payment of union dues, and (4) the employees will never be able to vote the Teamsters out. Any of these threats standing alone would be sufficient to overturn an election. Taken together, they created a threatening and coercive atmosphere which rendered it impossible for the Irving employees to have a free and untarnished choice and a fair election. That many of the threats were blatant lies makes this even more egregious.

Furthermore, the Employer allowed a flyer to remain on a Company bulletin board that had even more threats and misstatements, including specifically stating that the Employer would lose the Keller ISD contract if the union was voted in.

Additionally, management's improper surveillance of employees' interactions with Union organizers constitutes a violation of Section 8(a)(1) of the Act and deprived the employees of a free and untrammeled choice in connection with the election.

For all of the foregoing reasons, Petitioner respectfully requests that the Regional Director find that the election should be set aside, the certification of results withdrawn, and a new election be directed and held.

Respectfully submitted,

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/s/ David K Watsky
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ATTORNEY FOR TEAMSTERS LOCAL UNION 745

Dated: July 13, 2023.

CERTIFICATE OF SERVICE

A copy of this response has been served this day on the appropriate NLRB officials and all counsel of record.

/s/ David K Watsky
David K. Watsky

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

NORTH AMERICAN CENTRAL SCHOOL BUS
A.K.A ILLINOIS CENTRAL SCHOOL BUS
Employer

and **Case 16-RC-317560**

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION 997
Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

On May 25, 2023[1], Agents of Region 16 conducted an election among certain employees of North American Central School Bus A.K.A. Illinois Central School Bus (Employer). A majority of employees casting ballots in the election voted against representation by the International Brotherhood of Teamsters, Local Union 997 (Petitioner). The Petitioner filed six objections contesting the results of the election seeking to have the Region set aside the election and hold a new election. After conducting a hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Petitioner's request to withdraw three of its objections be approved, and that the remaining three objections be overruled in their entirety as the evidence is insufficient to show that the Employer engaged in the alleged objectionable conduct. Below, I will recount the procedural history, discuss the parties' burdens and the Board standard for setting aside elections. Then I will describe the Employer's operation and an overview of relevant facts. Finally, I will discuss each objection and my recommendation.

II. PROCEDURAL HISTORY

On May 8, the Petitioner filed a petition seeking to represent certain employees of the Employer.

On May 18, the Regional Director of Region 16 (Regional Director) approved a Stipulated Election Agreement (Agreement) scheduling an election for Thursday, May 25, at the Transportation Center Breakroom at the Employer's facility located at 11300 Alta Vista Road, Keller, Texas 76244 to be held during two sessions, one from 8:15 a.m. to 11:00 a.m., and the other from 1:30 p.m. to 4:30 p.m. The Agreement stipulated that the following unit (Unit) was appropriate for the purposes of collective bargaining and eligible to vote in the election on whether they wished to be represented by the Petitioner:

> **INCLUDED**: All full-time and regular part-time drivers and monitors employed by the Employer at its facility located at 11300 Alta Vista Road, Keller, Texas 76244.

[1] All dates are in 2023 unless otherwise indicated.

EXCLUDED: All other employees, including office clerical employees, dispatchers, mechanics, coaches, professional employees, guards, and supervisors as defined by the Act.

After the election was held, the ballots were counted, and a tally of ballots was provided to the parties. The tally of ballots shows that 78 ballots were cast for the Petitioner, and that 165 ballots were cast against representation. There were 14 non-determinative challenged ballots, and one void ballot. Thus, a majority of the valid ballots were not cast in favor of representation for the Petitioner.

On June 2, the Petitioner filed timely objections to the election.

On June 21, the Regional Director for Region 16 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections.

On June 28, I heard testimony and received into evidence relevant documents. The Petitioner and the Employer were afforded the right to call, examine, and cross-examine witnesses.

On July 13, the Petitioner and the Employer filed post-hearing briefs, both of which I have fully considered.

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc*., 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the

proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

IV. THE EMPLOYER'S OPERATION AND BACKGROUND

Since about 2019, the Employer has been engaged in the business of providing school, field trip, and other passenger transportation services pursuant to a contract with the Keller Independent School District (Keller ISD Contract). The Employer's operations and main bus lot are located at 11300 Alta Vista Road in Keller, Texas (Keller Location). The Employer shares an address with the Keller ISD Office Building (District Building). The Employer's administrative, supervisory, dispatch, safety, and other offices, as well as an employee breakroom, are housed in the front of the District Building. There is a main parking lot to the left of the District Building, and another overflow parking lot to the right. Adjacent to the District Building is a repair shop where the Employer performs maintenance on its transportation fleet.

The Employer maintains three remote lots, also referred to as "park-outs," including one at Keller High School; one at Caprock Elementary School; and one at Fossil Ridge High School. Each remote lot is home to more of the Employer's transportation fleet; where employees report to work; and located within four miles of the main lot. The Employer maintains one "Office bus" at each remote lot to serve as a location where employees: 1) receive and store their keys and other belongings; 2) clock in and out on the remote time clock; and 3) receive announcements and other information distributed by the Employer either on clipboards or by its "lot captain." The lot captain is typically a standby driver assigned to be there in the event a driver does not show for his/her shift. The record evidence failed to disclose that the lot captain was a statutory supervisor or agent of the Employer.

The parties stipulated on the record that the following named individuals and corresponding titles and responsibilities are the Employer's statutory supervisors within the meaning of Section 2(11) of the Act:

- Ken Harcrow, Contract Manager, is responsible for the overall operational authority and oversight of the Keller ISD Contract and possesses the authority to effectively recommend employees be disciplined and discharged.

- Jim Koons, District Manager, is responsible for operational oversight of the Keller ISD Contract, two separate company facilities (one in Texas, and the other in Topeka, Kansas), and possess the authority to effectively recommend employees' discipline.

- Keith Lane, Vice President of Human Resources, possesses the authority to effectively recommend that individuals be hired.

V. THE PETITIONER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular

testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

Objection 1: Before and during the critical period, the Employer surveilled employees while they were engaged with Petitioner organizers.

The Petitioner called three witnesses to testify in support of Objection 1, including Cuyler Elmore, Field Organizer for the Petitioner; Unit drivers Cheri O'Neil, Michael Short, and Fatima Munoz; and former field trip coordinator Jessica De La Fuente. The latter four had been employed by the Employer since taking over the Keller ISD Contract in 2019.

Record Evidence

In about 2019, the Petitioner began a campaign to organize certain of the Employer's employees. The onset of the COVID-19 Pandemic stopped the campaign, but it resumed in 2023. The Employer first learned of the organizing campaign on April 13.

1. Preceding the Critical Period

a. *April 13 at the Fossil Ridge High School Remote Lot*

On April 13, Petitioner representatives Elmore and Michele Goodman visited the Employer's Fossil Ridge High School remote lot in the morning and afternoon to campaign for the Petitioner. The record evidence failed to disclose Elmore's and Goodman's arrival and departure times, or how long they remained at the lot during their visits. The Petitioner did not notify the Employer of its visit in advance. There were no Employer managers or supervisors in the lot that morning. When Elmore and Goodman returned that afternoon, District Manager Jim Koons was in the lot standing by the Office bus.

That afternoon, Koons approached Elmore as he spoke with a Unit driver at their parked bus. This was Elmore's first interaction with any of the Employer's supervisors. Koons told Elmore that he was trespassing and could not be there. Elmore responded that he was on school property. Koons responded that it was the Employer's property and directed Elmore to leave. Elmore walked back to his and Goodman's vehicle parked by the Office bus where they continued to communicate with Unit employees. There was then an exchange of unknown duration where Koons yelled at Elmore and Goodman that they could not be there because it was the Employer's property. This exchange was witnessed by approximately five Unit drivers.

Around 5:00 p.m., Unit driver Michael Short arrived at the same lot to park his bus, perform his post-trip duties, and clock out. Short observed Elmore and Goodman speaking with drivers, and Koons standing next to the Office bus. Immediately after clocking out, Short told Koons that Short hoped Koons was listening to the drivers and their concerns. Koons responded that the Employer was always listening to drivers. Short did not observe any interaction between Koons and Elmore or Goodman.[2] Short has been assigned to the Fossil Ridge High School location remote lot for about the last four years and only recalls observing Koons visit the lot twice, including once

[2] Petitioner Exhibits 1 and 3 are photos taken on April 13: one being a photo showing Koons speaking with a female Unit driver and another being a photo showing Koons speaking with Short. The Employer is not alleged to have engaged in objectionable conduct during these exchanges.

about four years ago where there was some type of vandalism and another two years ago following an ice storm. Munoz had never seen Koons at this remote lot prior to April 13.

That same afternoon, Unit driver Fatima Munoz arrived at the lot after performing a route. Munoz's arrival and departure times to and from the lot are unknown. Munoz observed Koons standing next to the Office bus and Koons greeted her. Goodman spoke with Munoz at some point, but the record evidence failed to disclose: 1) the duration of that exchange; or 2) whether Koons was present during same or observed it. Munoz did not observe any verbal exchange between Koons and Goodman or Elmore. Prior to this day, Munoz never saw Koons at the Fossil Ridge High School location.

That day at 5:39 p.m., Petitioner's International Representative Matthew Taibi emailed the Employer's Vice President of Human Resources Keith Lane accusing Koons of not following the parties' Freedom of Association agreement,[3] surveilling employees, and attempting to remove the Petitioner's organizers from public property. On April 14, at 12:42 p.m., Lane responded to Taibi's email advising Taibi that, *inter alia*: 1) the Employer first became aware the previous day of unknown individuals lingering around school buses as they were backing up and moving around its leased property and potentially on school grounds; 2) the unidentified individuals were present during school bus vehicle safety checks and child-check processes, which is when the Employer's drivers need to be focused on those duties; 3) given the current environment related to student and employee security and school access safeguards, the Employer proceeded to investigate and notified Keller ISD; 4) the Employer did not know the unknown individuals were the Petitioner's organizers until it investigated the issue; and 5) moving forward, the Petitioner's organizers should remain outside of the Employer's lots, but that there are sidewalks at the entrances and exits where they can access employees.

b. *April 16 at the Keller High School Remote Lot*

On April 16, Elmore and Goodman visited the Employer's Keller High School remote lot in the morning and afternoon to campaign for the Petitioner. The record evidence failed to disclose Elmore's or Goodman's arrival and departure times, or how long they remained at the lot during their visits. No managers or supervisors were present during their morning visit. They stationed themselves in a grassy area in the lot about three to five car lengths from the Office bus.

That day during Elmore's and Goodman's afternoon visit, Contract Manager Harcrow arrived at the lot while Elmore was speaking with Unit driver O'Neil and her husband Richard O'Neil in their vehicle. Elmore and the O'Neils spoke for another thirty seconds before Elmore proceeded to a grassy area where Harcrow was speaking with Goodman. Elmore, Goodman and Harcrow proceeded to have a five-minute verbal exchange that was witnessed by the O'Neils, during which Harcrow advised Elmore and Goodman that they were trespassing and threatened to call the authorities to remove them. Elmore and Goodman replied that they were on school property, legally permitted to be there, and encouraged Harcrow to call the authorities. Harcrow subsequently left the lot. No security or law enforcement personnel arrived to remove Elmore and

[3] Joint Exhibit 11 is a four-page document titled "FREEDOM OF ASSOCIATION, Principles to protect employees' rights under the NLRA between North America Central School Bus and the International Brotherhood of Teamsters." The document is signed by both parties and dated two days after the filing of the Petition in the instant matter; however, the document states, in relevant part, that it "…shall become effective on October 1, 2022 and continue in full force through September 30, 2027…" Neither party testified about its contents or application; however, it appears to be a neutrality agreement setting forth procedural and other terms the parties agree to follow in the event of an organizing attempt. Although this agreement is signed and dated by the parties two days after the filing of the Petition, it states that it "… shall become effective on October 1, 2022 and continue in full force through September 30, 2027…."

Goodman. The record evidence does not disclose whether, how often, or under what circumstances managers and statutory supervisors may have visited this remote lot prior to April 16.

On April 17, at 8:54 a.m., Taibi emailed Lane about Harcrow's exchange with Elmore and Goodman the previous day, including how Harcrow yelled at the organizers about where they were standing and threatened to call security. Taibi noted that the organizers were not on the sidewalk (as Lane previously proposed in his April 14 email to Taibi related to the April 13 accusations at the Fossil Ridge High School remote lot) because it posed safety issues for employees, organizers, and traffic alike; however, Taibi noted that the organizers were away from the buses. Taibi concluded the email by asking Lane for suggestions about how to balance the organizers' safety concerns with their ability to communicate with employees. At 9:11 a.m., Lane responded advising Taibi that Lane would look into the matter, but that Lane had "… heard that [Harcrow] asked the organizers to move to public right-away [sic] and they refused to leave the lot."

c. *April 17 at the Employer's Keller Location (main lot)*

On April 17, Elmore and Goodman visited the Employer's main lot where they remained on the public sidewalk near one of the exits. About seven minutes into their visit, Harcrow appeared outside where he stayed and stared at them during the remainder of their visit. Elmore and Goodman did not communicate with Harcrow. During their time on the public sidewalk, Elmore and Goodman waved at, but did not speak to, Unit drivers as they entered the main lot in their buses. Elmore and Goodman spoke with about 25 employees as they left the lot. The record evidence failed to disclose: 1) the organizers' arrival or departure times; 2) the time of Harcrow's arrival; 3) Harcrow's distance from the organizers; and 4) whether, how often, or under what circumstances other managers and supervisors may have positioned themselves at or near where Harcrow was positioned in the past.

2. Critical Period Conduct

On May 8, Elmore and Goodman visited the overflow employee parking lot at the Keller Location. Around 8:55 a.m., the organizers were speaking with a male Unit driver when Harcrow arrived yelling at Elmore and Goodman to leave.[4] They refused and encouraged Harcrow to call security if there was an issue. The interaction lasted no more than a minute, after which Harcrow left the lot. There were at most four employees who witnessed this exchange.

From May 8 through May 24, Petitioner alleges purported supervisor "CJ" (full name unknown) engaged in surveillance at the Employer's Keller Location by: 1) waiting on Unit driver Short's bus while he pumped fuel; and 2) observing Short while they were both seated at picnic tables outside the District Building near the break room. Only Short, a known, open and vocal supporter of the Petitioner, provided testimony about CJ's alleged objectionable conduct.

With regard to CJ waiting on Short's bus, CJ sat on Short's bus or stood in the stairwell thereof stating that he was making sure the traffic in line moved smoothly. Before this time period, CJ remained *outside* Short's bus directing traffic when fueling. The record evidence failed to disclose: 1) how many times and for how long CJ waited on Short's bus while fueling; 2) how many times, for how long, and at what distance CJ positioned himself outside Short's bus preceding the organizing campaign; and 3) whether CJ waited on other Unit drivers' buses during the critical period.

[4] The male driver left as Harcrow approached them.

As for the CJ's conduct at the picnic tables, Short was previously the Administrator of a Facebook Group[5] for Unit drivers and monitors. On two separate occasions, Short sat at one of an unknown number of picnic tables for approximately 90 minutes to remove and add Unit employees from the Facebook Group. Each time, CJ sat at the same table as Short or at one directly across from him within earshot, and CJ remained seated for the entire 90 minutes that Short was there. On one of these occasions, there were two employees who asked Short what and how Short was doing but, when CJ arrived, these employees stopped speaking. CJ engaged in chit chat and small talk with Short during both of these times. The record evidence failed to disclose that CJ spoke with any Unit employees about the Petitioner or its campaign. The record evidence failed to disclose CJ's precise title[6] or whether he exercised or possessed authority indicative of supervisory status pursuant to Section 2(11) of the Act.

On May 24, Agents of Region 16 conducted an inspection of the polling place by Zoom videoconference with the parties. Present for the Employer were Koons and Lane. Present for the Petitioner were three representatives, including Elmore and Goodman. During the inspection someone raised the subject of cameras in the polling place. Koons and Lane initially denied the presence of such, but later conceded that there were cameras in the voting area that did not work. An agent of Region 16 directed the Employer to cover the cameras during the polling times.

On May 25, prior to the opening of the polls, Elmore inspected the voting area and confirmed the cameras were covered with tape. Around 10:00 a.m., while the first polling session was in progress, a Keller ISD security officer entered the polling area where he remained for less than five minutes. The officer asked the Board Agent why the cameras were shut off or blocked, to which the Board Agent replied that it was on account of the election. The officer said he would return to make sure the cameras were uncovered and operational after the election concluded, and he left the area. There were "a couple" of employees casting their ballots at the time the security guard was in the voting area. Some days later, Elmore and Goodman attended a District School Board meeting where the same security officer who entered the voting area was present. Elmore and Goodman asked the security officer at this District meeting how he determined the cameras were not working on the day of the election. The security officer responded that the District received a call from someone to check the cameras, but the officer did not identify who called the District.

Board Law

1. Prepetition Conduct

Conduct that occurs prior to the critical period is generally not objectionable. *Ideal Electric*, supra. One exception to this rule is where the prepetition conduct is so egregious or likely to have a "significant impact" within the critical period. See *Servomation of Columbus*, 219 NLRB 504, 506 (1975) (violence or threats thereof) and *Royal Packaging Corp.*, 284 NLRB 317 (1987) (promises of benefits in violation of the *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973)). Another exception where the Board may consider prepetition conduct is when it "adds meaning and dimension to *related* postpetition conduct. [Emphasis Added]" *ManorCare Health Services*, 362 NLRB 644, 644 FN.5 (2014) citing *Dresser Industries*, 242 NLRB 74, 74 (2009).

[5] The record evidence failed to disclose when this Facebook Group was created and whether it was a work-related Group, created as a tool for Unit employees to communicate with each other about the Petitioner's campaign, or something else.

[6] Short's understanding was that CJ's title was maintenance shop manager or supervisor; Munoz's understanding was that his title was lead mechanic.

In *ManorCare*, the Board reversed the Hearing Officer's conclusion that the employer did not engage in objectionable conduct when it announced a wage increase preceding the critical period, because during the critical period the employer "… distributed a letter to each [employee] announcing the precise amount of the wage rate increase that each would receive[;] first announced to 11 of its [employees] that they would be receiving a lump-sum bonus payment[;] and first issued each [employee] a paycheck that included either the wage increase or lump-sum bonus payment." *Id*., 644. See also *Desert Aggregates*, 340 NLRB 289, 290 FN. 5 (2003) (same); *Catalina Yachts*, 250 NLRB 283, 291 (1980) (setting aside election based, in part, on wage increase that went into effect prior to the filing of a representation petition, but first appeared in employees' paychecks during the critical period).

In *Dresser Industries*, the Board concluded in an earlier proceeding that the employer prepetition visited four employees' homes for the purpose of soliciting grievances, threatened a loss of benefits and promised benefits, and interrogated two employees. The Board concluded that the employer's interrogation and promise of benefits toward one employee during the critical period was sufficient to set aside the election. *Id*., 74. Rejecting the employer's contention that the critical period misconduct was isolated and insufficient to warrant setting aside the election, the Board concluded "…that the prepetition conduct in this case lends additional meaning" to critical period misconduct and emphasized that critical period misconduct took place one week before the election which was decided by only one vote. *Id*., 75.

2. Surveillance

"In determining whether an employer's statement has created an unlawful impression of surveillance, the test is 'whether the employees would reasonably assume from the statement that their union activities had been placed under surveillance.' The standard is an objective one, based on the perspective of a reasonable employee." *Durham School Services, L.P.*, 364 NLRB 1575, 1577 (2016) citing *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

"Although an employer may observe open union activity on or near its property, 'an employer may not do something "out of the ordinary" to give employees the impression that it is engaging in surveillance of their protected activities.'" *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007) quoting *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003); see also *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005).

As the Board stated in *Wild Oats Markets*, 336 NLRB 179, 180 (2001):

> "It is well established that an employer may properly prohibit solicitation/distribution by nonemployee union representatives on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer's prohibition does not discriminate against the union by permitting others to solicit/distribute. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). This precedent, however, presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from that property. Therefore, in situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the

property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act."

3. Supervisory Status

"It is well established that the 'burden of proving supervisory status rests on the party asserting that such status exists.'" *Entergy Mississippi, Inc.*, 367 NLRB No. 109, slip. op. at 3 (Mar. 21, 2019) citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). "Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip. op. at 3 (2017); see also *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). "Supervisory status is not proven where the record evidence 'is in conflict or otherwise inconclusive.'" *Entergy Mississippi*, supra, quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Recommendation

The Petitioner contends that the Employer engaged in objectionable surveillance of employees' protected activities, or gave employees the impression thereof: 1) before the critical period, by Koons on April 13, and Harcrow on April 16 and 17; and 2) during the critical period, by Harcrow on May 8, by CJ at various times during the three-week period leading up to the election, and by a Keller ISD security guard in the polling area during the election's morning voting session. For the reasons that follow, I recommend the Petitioner's Objection be overruled in its entirety because it has failed to establish the Employer engaged in objectionable conduct and, even assuming it had, it was insufficient to affect the outcome of the election.

1. Prepetition Conduct

Regarding Koons' conduct on April 13, Koons visited the lot no more than two times over a four-year period due to an unspecified incident(s) of vandalism and a weather-related event preceding the campaign. Koons was possibly present on April 13 to improperly surveil the Petitioner's organizers communicating with Unit employees, and it is equally plausible that he was present because of legitimate safety issues caused by the organizers' presence and interfering with employees' work duties. The record evidence failed to disclose any information about: 1) the Employer's solicitation/distribution policy, if any; 2) how long Koons was present at the remote lot on this day, or the preceding times he had visited the lot; 3) the employees' schedules, and whether they were on or off the clock for all or a portion of the time that Koons was on the lot; or 4) whether the Employer has a legitimate property interest over this or any of its other lots.

Regarding Harcrow's conduct on April 16, Harcrow arrived at the lot, engaged in a five-minute verbal exchange with the Petitioner's organizers, asserted that they were trespassing and threatened their removal, and departed the lot immediately thereafter. The record evidence failed to disclose whether Harcrow stationed himself in or outside the lot, engaging with or observing Unit employees.

Regarding Harcrow's conduct on April 17, he stationed himself at an unknown distance from the Petitioner's organizers for an unknown duration of time while they distributed literature to employees on the public sidewalk outside the lot. The record evidence failed to disclose how often, or under what circumstances Harcrow or any other supervisor may have positioned themselves in the past.

Accordingly, on this record, even assuming Koons' and Harcrow's above prepetition conduct transpired during the critical period, the Petitioner has failed to meet its burden to establish that they engaged in any "out of the ordinary" conduct that could be construed as objectionable.

2. Critical Period Conduct

Regarding Harcrow's conduct on May 8, Harcrow arrived at the parking lot, engaged in a one-minute verbal exchange with the Petitioner's organizers directing them to leave, and he departed immediately thereafter. There was no evidence of Harcrow stationing himself in or outside the lot, or of him engaging with or observing other employees. As with the Employer's above prepetition conduct, the Petitioner failed to meet its burden to establish that the Employer engaged in objectionable surveillance or that it gave employees the impression thereof.

To the extent the Petitioner alleges the Employer engaged in objectionable conduct by threatening to remove the Petitioner's organizers from the remote locations' parking lots, and assuming the Employer did not have a sufficient property interest to do so, the Petitioner did not explicitly allege this in its objections. It is true that the "Board will consider allegations of objectionable conduct that do not exactly coincide with the precise wording of objections so long as the allegations are 'sufficiently related' to the objections." *Didlake, Inc.*, 367 NLRB No. 125, slip. op. at 1 FN.1 (2019) citing *Fiber Industries*, 267 NLRB 840, 840 fn. 2 (1983). At the same time, "… a hearing officer lacks authority to 'consider issues that are not reasonably encompassed within the scope of the objections that the Regional Director set for hearing.'" *DLC Corp. d/b/a FleetBoston Pavilion,* 333 NLRB 655, 656 (2001) citing *Precision Products Group*, 319 NLRB 640, 641 (1995). Accordingly, to the extent this issue was not alleged as, or sufficiently related to any objection that the Regional Director set for hearing, and insofar as it was not fully and fairly litigated, I conclude that this issue is not before me. See *Iowa Lamb Corp.*, 275 NLRB 185, 185 (1985).

Assuming, *arguendo*, I were to conclude that the Employer's conduct was objectionable on all of the above-referenced days, including its threats to remove the Petitioner's organizers, I would nonetheless recommend it be overruled because it did not impact the outcome of the election. In this regard, and casting the most favorable light upon the Petitioner's case, no more than 38 employees witnessed the Employer's alleged misconduct, but the Petitioner lost the election by a margin of 87 votes. See *Werthan Packaging*, 345 NLRB 343, 343-344 (2005) (Board declined to set aside election where supervisor engaged in objectionable interrogation of three employees and threatened a fourth, but declining to set aside election where objectionable conduct affected at most five employees and union lost election by 21 votes); *M.B. Consultants, Ltd*., 328 NLRB 1089, 1089 (1999) (Board declined to set aside election where union lost by six votes and there was no evidence employer's objectionable promise of benefits to two employees was disseminated to others).

With regard to whether the Employer engaged in objectionable conduct through CJ requires me to conclude that he was the Employer's statutory supervisor or agent within the meaning of Section 2(11) or (13) of the Act, respectively. The Petitioner has failed to meet its burden that CJ is either. Even assuming I were to conclude that CJ was the Petitioner's statutory supervisor or agent and he engaged in objectionable surveillance, to the extent his misconduct affected at most three employees, my recommendation to overrule this objection would remain unchanged because it did not impact the outcome of the election. *Werthan Packaging*, supra.

As for the conduct of the Keller ISD security officer during the morning polling session, he was in the voting area for less the five minutes to ask the Board agent why the cameras were not operational, and he left when the Board Agent advised it was because of the election. The Petitioner has not met its burden to establish that the Employer engaged in objectionable conduct via this security officer. The record evidence failed to disclose that the Keller ISD security officer was the Employer's agent within the meaning of 2(13) of the Act, or that the Employer caused the security officer to enter the voting area. Furthermore, assuming the Keller ISD security officer was the Employer's agent, the Petitioner has failed to show he engaged in objectionable conduct. It is never ideal when a party's agent enters the polling area, but it does not follow that a party who does so engages in per se objectionable conduct. See *Sea Breeze Health Care Center, Inc.*, 331 NLRB 1131, 1144-1145 (2000) (supervisors accidentally entered the voting area, left when immediately asked to do so, and no voters were present during the exchange; not objectionable). There were two employees present who cast ballots during this exchange but in my view, the security officer's comments would not only serve to quell any fears employees may have that they were being surveilled since he confirmed that the cameras were not operational, but the record evidence failed to disclose that the security officer engaged in any contemporaneous coercive or intimidating conduct in the polling area.

Even if I were to conclude the security officer's conduct in the polling place did amount to objectionable surveillance or the impression thereof, to the extent it only affected two unit employees, my recommendation would still be to overrule the objection because it did not impact the outcome of the election. *Werthan Packaging*, supra.

Objection 2: Before and during the critical period, the Employer interrogated and polled employees about their support for Petitioner.

The Petitioner orally requested to withdraw this objection on the record, and the Employer did not object to this request. I recommend the Regional Director approve the Petitioner's withdrawal request.

Objection 3: Before and during the critical period, the Employer terminated two known supporters of Petitioner.

The Petitioner submitted a written request to the Regional Director to withdraw this objection prior to the opening of the Hearing, it verbally renewed its request on the record, and the Employer did not object to the Petitioner's withdrawal request. I recommend the Regional Director approve the Petitioner's withdrawal request.

Objection 4: During the critical period, the Employer threatened worse working conditions, loss of benefits, and the loss of the Employer's contract with Keller ISD.

Objection 5: During the critical period, the Employer told employees that negotiations would be futile.

The Petitioner offered the testimony of four witnesses in support of its objections, including Elmore; Unit drivers O'Neil and Short; and former field trip coordinator Jessica De La Fuente. As the objections are closely interrelated, they will be addressed together herein.

Although the Petitioner characterized the alleged objectionable conduct as transpiring during the critical period, its post-hearing brief references testimony and Employer communications and meetings that transpired preceding the critical period to support its position.

Accordingly, I will first address the prepetition record evidence followed by the record evidence during the critical period.

Record Evidence

The written communications referenced below are undisputed, and the parties stipulated that the Employer disseminated them to all Unit employees either by regular mail or in person at one of the Employer's multiple locations, including the Keller Location.

1. Preceding the Critical Period

    1. *April 17 Letter*[7]

This one-page document on Employer letterhead signed by District Manager Koons and Contract Manager Harcrow advises employees, in relevant part, that:

- "… [P]rofessional organizers from the Teamsters Union have visited some of our Keller locations to solicit support for the union, obtain signatures on union authorization cards, and ultimately become your exclusive bargaining agent."

- "We pledge not to attack the Teamsters or make disparaging comments about the union or their paid representatives. Please know that the Company respects the rights of employees under the law and will focus on providing factual and fair information to you."

- "As with any organization, there will always be areas of challenges. […] It is a continuous effort to make improvements, but by now you know us and know that we will work hard to of what is right for you and your kids. We strive to move forward and continue to build a foundation of teamwork, trust, respect, cooperation, safety and customer focus. As an example, within the past few weeks, we have adjusted charter and trip procedures to improve visibility, access to extra work, and fairness in the assignment project."

    2. *April 17 Staff Meeting*

On April 17, Koons conducted a meeting in one of the Employer's offices in the District Building with its full-time staff, excluding all Unit employees. Those present included individuals who worked in payroll, safety, dispatch, maintenance and other departments. Koons said how everyone was aware the Union was trying to organize employees, drivers' emotions were running high, and everyone needed to stay focused and calm. He said drivers would look for every excuse to get the union in, and he directed everyone to follow the Employer's policies and procedures. Koons spoke about tactics he had used in the past to persuade employees against union representation (or "to get out of the union" as recalled by Petitioner witness De La Fuente), such as buying and stacking up red gas cannisters, and purchasing many groceries and placing them on pallets, to show how much gas and groceries employees could have purchased had they not been required to pay union dues. Koons said the Employer did not want a union at the Keller Location and he was going to squash it. Purported supervisor CJ and others speculated that a former female employee named Sylvia, who separated from the Employer over a year preceding this meeting, started the organizing campaign. Koons replied that Sylvia needed to go to Lewisville (where the

[7] See Joint Exhibit (JE) 1.

Employer had a collective bargaining agreement with one of the Petitioner's sister locals) if she wanted a union.

3. *April 20 Letter*[8]

This letter is signed by Koons and Harcrow advising employees that an unnamed employee was assaulted by an unknown individual outside of work hours, and how the Employer was working with local authorities and took employee safety seriously. The Petitioner and its representatives are not explicitly referenced therein, but the letter states: "We recognize that there are those that are attempting to use this tragic event to further their goals." O'Neil interpreted the foregoing to be a veiled reference to the Petitioner.

2. <u>During the Critical Period</u>

1. *May 9 Meetings*

The Employer and the Petitioner's sister Local No. 745 are parties to a collective bargaining agreement (CBA) at its location in Lewisville, Texas, effective by its terms from May 19, 2021, through August 31, 2025. Vice-President of Human Resources Keith Lane and Regional Operations Manager Scott Allen signed the CBA for the Employer.

On May 9, Koons conducted three meetings with Unit employees starting at 9:00 a.m., 1:00 p.m., and 5:00 p.m.. Short attended all three meetings; O'Neil only attended the 5:00 p.m. meeting. Koons used the same PowerPoint presentation during each meeting and did not deviate therefrom. The PowerPoint[9] is comprised of 22 slides summarized as follows:

- Slide 1 is the title of the meeting: "Keller Driver & Monitor Communication Meeting."

- Slide 2 is titled "Introduction," and sates that the purpose of the meeting is to provide employees with information regarding the Petitioner's organizing efforts, and it encourages employees to ask questions about "… unionization, the election process, current Teamster agreement, and bargaining."

- Slide 3 is titled "Our Approach," and sates that: 1) the purpose of the meeting is to provide information for employees to make an informed choice whether to join or not join a union; 2) the Employer respects the rights of employees under the National Labor Relations Act to support or not support a union; 3) the Employer has pledged in writing not to attack or disparage the Petitioner, and the Petitioner has pledged not to make promises or offer incentive to accept or reject the Petitioner; and 4) notwithstanding the foregoing, the Employer's opinion is that unionization is not in the best interest of employees.

- Slide 4 is titled "Teamster Notification of Intent to File for Election," and it quotes an email from Petitioner International Representative Taibi to the Employer advising that it intends to file a petition in 20 days to represent Unit employees.

- Slide 5 is titled "Lewisville vs. Keller," and states that the Teamsters have organized the Employer's Lewisville operation and, since that operation is only a few miles from

[8] See JE 2.
[9] See Employer Exhibit 2.

its Keller operation, "… it's only fair to see what the Teamsters have done at Lewisville."

- Slides 6 through 12 are titled "Lewisville Teamsters CBA vs. Keller Union-Free."

    - Slide 6 asks the Unit employees which of these two facilities had higher/greater/better guaranteed route hours, amount of paid holidays, amount of pay for holidays, bereavement leave policy, jury duty leave policy, and better insurance and 401(k).

    - Slide 7 compares the guaranteed minimum hours of work, number of holidays, and holiday pay at each facility.

    - Slide 8 compares the bereavement leave, jury duty, and insurance & 401(k) terms at each facility.

    - Slide 9 compares the driver's wages at various seniority levels (starting, average of years 1-10, average of years 21-30, and top) at each facility.

    - Slide 10 compares the weekly rate of pay drivers at each facility would earn based on their guaranteed minimum hours and the average wages of various seniority levels from Slide 10.

    - Slide 11 compares the monitor's wages at the same seniority levels set forth in Slide 9 at each facility.

    - Slide 12 compares the weekly rate of monitors at each facility that they would earn based on their guaranteed minimum of hours and the average wages of various seniority levels from Slide 11.

- Slide 13 is titled "Lewisville vs. Keller," and states how both locations recently completed an employee survey, which results the Employer shared with employees two weeks previous. It goes on to state that the Employer will share employee feedback from those surveys, and how one would expect feedback at Lewisville to be better than Keller because the former facility is unionized.

- Slides 14 through 16 are titled "Lewisville vs. Keller Employee Survey Results."

    - Slide 14 has two bar graphs showing the percentage of employees at each facility who agreed with questions numbered 1 through 5. The bottom of the slide notes that Keller employees equaled or outscored the Lewisville on each question with the exception of one, and it quotes that question, which states, "I understand why my regular attendance, high quality of work, and commitment to safety are important to the students, parents, school district, and my location," and the one on which both groups of employees scored equally, which states, "Compared to other school bus companies, my pay is similar/comparable."

    - Slide 15 has two bar graphs showing the percentage of employees at each facility who agreed with questions numbered 6 through 11. The bottom of the slide states that Keller employees outscored Lewisville's employees on each of these questions, and Keller employees "… scored their working conditions

much better than the union employees at Lewisville." The slide does not quote or otherwise summarize what the questions were.

  - Slide 16 has the same two bar graphs as Slide 15 and the results of question 8 and 9 circled. The bottom of the slide quotes those questions and the percentage of employees who agreed with each question at each facility, which were higher at Keller. Question 8 states: "Policies and rules are fairly and consistently enforced at my location." Question 9 states: "Charters and trips are assigned fairly at my location."

- Slide 17 is titled "What is the difference between Keller and Lewisville." It notes that both locations are the same company, have the same Regional Manager, the same District Manager, and the same Company Handbook, but notes: "The one different between the two locations is (?) TEAMSTERS[.]"

- Slide 18 is titled "What we have learned today." It states that Lewisville employees rated their working conditions and relationship with management as being worse than Keller; the Teamsters representing Lewisville employees have not bargained better wages, benefits and working conditions compared to Keller; and the Employer does not see a benefit for Unit employees unionizing.

- Slide 19 is titled "Thank You," and states that the Employer recognizes and supports Unit employees' right to: 1) understand the process; 2) the commitment the Petitioner's supporters are asking employees to make to the Teamsters; and 3) to support or not support a union. It concludes with the Employer repeating its opinion that unionization is not in the best interest of Unit employees, Keller ISD, the community, the students, or the Employer, and that the Employer-employee relationship is "… best served without interference of a third-party."

- Slide 20 is a graph of the Lewisville employees' feedback to survey questions 1 through 5 (as reflected in Slide 14), and each question is quoted verbatim.

- Slide 21 is a graph of the Keller employees' feedback to survey questions 6 through 11 (as reflected in Slide 15), and each question is quoted verbatim.

- Slide 22 is a graph of Lewisville employees' feedback to survey questions 6 through 11 (as reflected in slide 15), and each question is quoted verbatim.

At the 5:00 p.m. meeting, as Koons compared the Keller and Lewisville employee survey results, O'Neil asked Koons why the Employer's Keller location would not want a union when it appeared to cost less to operate the Lewisville location. Koons' response was that he felt the Employer would be better off without a union. Employees asked additional questions, and Koons responded; however, the record evidence failed to disclose the specifics of such questions and answers.

Short recorded all three meetings and uploaded the audio onto YouTube accompanied by a slideshow presentation of 26 examples of Short's artwork of clowns, but the Petitioner failed to introduce these recordings into the record. Short testified that during the third meeting Koons "specifically talked about the guaranteed pay increases at Lewisville and alluded to… that we were guaranteed pay increases as well, *or* that we had received increases in excess of what Lewisville had received," at which point Short asked Koons "What are we guaranteed to receive as far as pay

increases?" Koons replied that employees were "not guaranteed any pay increases ever at Keller ISD." To the extent the foregoing underlined testimony could be construed as Koons promising employees a pay increase to vote against union representation, I neither credit it, nor do I consider it objectionable conduct even if it were credited, for the following reasons: 1) Short's testimony was not corroborated and, in this regard, I draw an adverse inference over the Petitioner's failure to offer Short's recordings of this meeting into the record; 2) Short testified that Koons could have said what was underlined *or* that employees had received increases in excess of what Lewisville would have received, the latter being more likely as it is precisely what is stated in PowerPoint Slide 10; and 3) even assuming the underlined testimony is credited, Koons effectively repudiated it in the same breath by stating unequivocally that Keller employees are not guaranteed any pay increases.

2. *May 11 Letter*[10]

On May 11, the Employer distributed a letter to employees signed by Koons and Harcrow updating employees on "… Teamsters' efforts to organize your location and a recap of our informational meetings" from two days earlier. This letter communicates a summary of the more specific information communicated by the Employer in its May PowerPoint presentation, including that:

- The Petitioner had sought recognition without a vote by claiming a majority of employees have signed cards authorizing it as its exclusive bargaining representative, but that the Employer "… refused to recognize the Teamsters absent a vote of our employees [and] [w]e doubt their claim to represent a majority of you."

- "Thanks to everyone that attended one of our meetings this week. We were able to share that the Teamster represented Lewisville Texas Central School Bus drivers and monitors receive fewer guaranteed daily hours, fewer paid holidays, less holiday pay, rate their working conditions and environment much lower, and are paid comparable to you. They have the same insurance and 401(k) as you. These are the facts." [Emphasis in Original]

- "As we discussed at the meetings, let's compare the two locations. The locations are both Texas Central [a short-hand name for the Employer], report to Scott Allen our Regional Operations Manager, and work with District Manager Jim Koons. So, while Lewisville [Unit] drivers and monitors receive fewer guaranteed daily hours, fewer paid holidays, less holiday pay, rate their working conditions and environment much lower, and are paid comparable to you, what is the difference? It comes down to one word. The difference is the Teamsters. The Lewisville employees are represented by the Teamsters, and you work directly with us without a union. The presentation from our meeting showed that the Teamsters have not driven up standards for their Lewisville union members. We believe this is the key difference. It is also the critical question facing you. Do you want to continue moving forward and building a foundation of teamwork, trust, respect, cooperation, safety, and customer focus or bring in an adversary type of a relationship into your working conditions and workplace environment. We ask you to say NO to the Teamsters and their union organizers." [Emphasis in Original]

[10] See JE 6.

3. *The Illinois Cooperation Agreement (ICA)*[11]

The ICA is an agreement between the parties' parent entities: International Brotherhood of Teamsters and Illinois Central School Bus. The first six pages are agreed-upon amendments to the original eleven-page ICA. The original ICA was effective by its terms from April 17, 2018, through September 30, 2022, and it contains 49 Articles addressing various "generalized" and primarily noneconomic terms and conditions of employment that apply to specific company facilities represented by specific Teamsters local affiliates. The conditions of employment included, but were not limited to, Union Recognition and Dues; Shop Stewards; Access to Premises; Compensation Claims; Non-Discrimination Clause; Uniforms; Safety; Jurisdictional Disputes; Bulletin Boards; Personnel Files; Drug and Alcohol Policy; Layoff; Transfer Rights; Seniority; Jury Duty; Summer Recess; Work Rules/Policies; Leaves of Absence; Background Checks; No Strike/No Lockout; Miscellaneous Benefit Provisions; and Dispute Resolution. "ARTICLE 2. SCOPE OF AGREEMENT" sets forth the following relevant terms of employment:

- "Section 1. […] "It is the intent of the parties that generally negotiated terms and conditions of employment will be set forth in the ICA and that locally negotiated conditions generally will be narrowly limited in scope to locally negotiated economic provisions and local terms and conditions of employment, which will continue to control operations, notwithstanding anything to the contrary condition in this Agreement. Such local terms and conditions include but are not limited to management rights clauses, grievance and arbitration provisions, assignment of work and hours of work provisions."

- "Section 4. […] All employees covered by this [ICA] and the various local agreements, supplements and/or riders shall constitute one (1) bargaining unit."

The amendments to the ICA did not change the foregoing Sections of ARTICLE 2, but it did make the following changes, among others:

- The amendments are effective by its terms from October 1, 2022, through September 30, 2027.

- Article 1, "Section 3. Additional Operation," was amended to read: "To the extent permitted by law, the provisions of [the ICA]… will extend and apply to any operation where an [International Brotherhood of Teamsters] affiliate is certified or recognized as the representative of the bargaining agreement."

4. *May 17 Meetings*

On May 17, Lane conducted three meetings with Unit employees starting at 9:00 a.m., 1:00 p.m., and 5:00 p.m. The meetings lasted about 45 minutes. There were approximately 40 employees present for each meeting. O'Neill attended all three meetings. Short attended the first two meetings. Lane used the same PowerPoint presentation[12] during each meeting. The PowerPoint is comprised of 22 slides summarized as follows:

- Slide 1 is the title of the Presentation: "Keller Driver & Monitor Communication Meeting."

[11] See JE 12.
[12] See Employer Exhibit 1.

- Slide 2 is titled "Our Approach," and states: 1) the purpose of the meeting is to provide information for employees to make an informed choice whether to join or not join a union; 2) the Employer respects the rights of employees under the National Labor Relations Act to support or not support a union; and 3) notwithstanding the foregoing, the Employer's opinion is that unionization is not in the best interest of employees and other stakeholders.

- Slides 3 and 4 are titled "Opening Comment about Respect and Integrity."

    - Slide 3 opens with a quote from the parties' FOA neutrality agreement: "The parties commit to fostering a collaborative and harmonious relationship built on trust, integrity and mutual respect. Neither Party will make promises or voice opinions that attack or disparage the Union or the Company." The Slide goes on to express the Employer's disappointment that the "Teamsters organizers secretly recorded and photographed our meetings and those in attendance…[, and]… portrayed Jim Koons publicly in a derogatory and offensive manner on YouTube by inserting various evil clown pictures over his voice."

    - Slide 4 is a YouTube snapshot of the one-hour and twenty-minute YouTube video of Koon's May 9 meetings that Short previously created and posted to YouTube with a picture of a clown.

- Slide 5 is titled "Election Information," and states the outcome of the election will be based on Unit employees who cast ballots, and it urges employees to vote no.

- Slides 6 through 13 are titled "Teamsters have already negotiated for you," and implicate the ICA.

    - Slide 6 states, *inter alia*: 1) "The Teamsters have already negotiated with North American Central School bus on your behalf[;] 2) <u>While you did not get to have a voice or any representation at the table, the Teamsters bargained for you prior to even representing you</u>[;] and 3) <u>You may not agree with the union bargaining on your behalf before representing you. You may not be happy that you did not have a local driver or monitor at the table. You may be very unhappy because you didn't get to vote on the Agreement. However, the Teamsters took it upon themselves to bargain on your behalf</u>." [Emphasis in Original]

    - Slide 7 opens with "We should look at what the Teamsters have decided is best for you." It then accurately quotes the ICA as an "Agreement between international Brotherhood of Teamsters & Illinois Central School Bus," effective "October 1, 2022 – September 30, 2027," which "<u>Covers a total of 49 Articles and 24 Sections and Subsections</u>[,]" and it lists every Article referenced therein. [Emphasis in Original]

    - Slide 8 opens with "Here are a few key points we would like to share with you," and it accurately quotes "ARTICLE 1. PARTIES TO THE AGREEMENT[;] Section 3. Additional Operation[;] The provisions of this Agreement, to the extent legally permissible, shall extend and apply to any operation where an affiliate of the IBT is certified or recognized as the bargaining unit representative."

- Slide 9 accurately quotes "ARTICLE 2. SCOPE OF AGREEEMENT[;] Section 1. Scope and Approval of Local Supplements[;] It is the intent of the parties that generally negotiated terms and conditions of employment will be set forth in the ICA and that locally negotiated conditions generally will be narrowly limited in scope to locally negotiated economic provisions and local terms and conditions of employment, which will continue to control operations, notwithstanding anything to the contrary condition in this Agreement. Such local terms and conditions include but are not limited to management rights clauses, grievance and arbitration provisions, assignment of work and hours of work provisions." [Emphasis in Original]

- Slide 10 accurately quotes "ARTICLE 2. SCOPE OF AGREEMENT[;] Section 4. Single Bargaining Unit[;] All employees covered by this Illinois Cooperative Agreement and the various local agreements, supplements and/or riders shall constitute one (1) bargaining unit."

- Slide 11 is identical to Slide 7, except in the list of all 49 of the ICA's Articles, instead of in standard font the following is in bold: "**ARTICLE 3. UNION RECOGNITION AND DUES**…."

- Slide 12 accurately quotes Article 3 of the ICA, which is a lawfully-worded union-security provision by which employees are required to pay their appropriate share of union dues as a condition of employment.

- Slide 13 is identical to slide 12, except the following language is underlined from Article 3: "An employee who fails to satisfy the financial requirements or other obligations of the Local Union a herein provided, shall be terminated seven (7) working days after his/her Employer has received written notice from an authorized representative of the Local Union." [Emphasis in Original]

- Slides 14 through 18 are titled "This is about the money."

  - Slide 14 states: 1) it is typical for a union to waive initial fees for employees, and it may promise not to charge dues, fees, fines and assessments until a CBA is reached, but, once there is a CBA, "… a union will require bargaining unit members to pay various things such as dues, fees, fines and assessments[;]" 2) a union makes the foregoing waivers and promises to secure support and votes; 3) "… a union's only source of funds are from members in the form of dues, fees, fines, and assessments[;]" and 4) "Texas is a right to work state. Thus, mandatory membership in the union cannot be part of the CBA. However, with the exercise of right to work, a bargaining unit member may lose rights such as attending meetings, assisting in the bargaining process, voting on CBA's, running for office, voting for officers, attending conventions, and others." [Emphasis in Original]

  - Slide 15 shows a screenshot of an email from Tony Seminary of Teamsters Local 179 dated April 18, to three named individuals with a "Illinois-central.com" email address, with the subject line "Initiation fee," and stating: "Please be aware that as of Monday April 17th the initiation fee for the bus drivers and monitors has gone from $50.00 to $200.00. It was put to an election and passed. Thank you in advance." The Slide states at the opening in reference

to the foregoing email: "the entire Teamsters' local membership voted to increase the fees for school bus drivers. The vote was not isolated to just the school bus drivers. The union took initiation fees from $50 to $200. Thus, a new driver, who is paid $17.50 at this location, is required to pay the equivalent of 11.5 hours to the Teamsters for the right to join the workforce. Based on the 4-hour daily guarantee under the [Lewisville] CBA, a new driver would pay the union 3 days wages (before taxes) for the right to work at the unionized location. It is a condition of employment to pay the union." [Emphasis in Original] A review of the ICA reflects that Teamsters Local 179 represents the Employer's employees at its locations in Coal City, Kankakee, and Wilmington, Illinois. Illinois is not a Right-to-work-State; that is, employers and unions in Illinois are permitted to have union-security provisions in their CBAs that require employees to pay their appropriate share of union dues and fees as a condition of employment.

- Slide 16 shows a screen shot of an email from Seminary to a named individual with an "Illinois-central.com" email, with a partially-redacted subject line stating "Service fee payor," and stating: "You have [name redacted] who works at the Wilmington yard with you. She is a service fee payor. She has not paid her service fees since October and is in violation of the contract. If she does not pay the monies owed for her service fees by 3/13/23 I will not have a choice but to request her employment ends with Illinois-Central as per the contract. I would hate to do this but it's not fair that everyone else pays what is required except her. She currently owes $267.15 and needs to be paid in full." The Slide states at the opening in reference to the foregoing email: "You have a right to know that the Teamsters are not here to provide a free service. They expect dues and fees to cover the union's expenses, including paying the organizers that have been here at Keller. Unions obtain the funds to operate through union dues, fees, fines, and assessments." [Emphasis in Original]

- Slide 17 shows a screenshot of an email from Seminary dated January 11, addressed to a named individual with an "Illinois-central.com" email, with the subject line redacted, and stating: "[name redacted] received a quarterly statement in Oct for 3 months. [W]aiting till January statement will be for 6 months. He owes now. We are not waiting. He has 6 days now to settle what he owes." The Slide states at the opening in reference to the foregoing email: "There are union organizers [who] will claim this is an isolated, rare event. However, here is another example from this year."

- Slide 18 shows a screenshot of an email from Seminary dated January 29 to the same individual who received his email in slide 17, with the subject line redacted, and stating: "[name redacted] has not paid his service fees yet. Is he still working?" The opening of the slide states: "A follow up email from the Teamsters' Organizer and Business Agent."

- Slides 19 and 20 are titled "Teamsters have already negotiated for you[.]"

  - Slide 19 accurately quotes from the ICA the opening portion of "ARTICLE 32. JURY DUTY[;] Any regular seniority employee who is called for jury duty shall be paid his regular rate of pay for all days the employee serves on the jury for up to three weeks per year."

- Slide 20 accurately quotes the first two of three paragraphs of "ARTICLE 37. WORK RULES/POLICIES," which states: ""The Company agrees it shall provide the Union advance notice of new rules/policies, including the employee handbook and changes to existing work rules/policies and the Union shall be provided an adequate opportunity to substantively confer prior to implementation. It is understood all rules/policies will be reasonable and the Union has the right to challenge the substance and reasonableness of the changes and the implementation thereof through arbitration or other appropriate legal processes."

- Slide 21 is titled "What we have learned today," and sets forth four numbered items: 1) If employees don't vote they make it easier for the union to win; 2) "Teamsters have already negotiated a Collective Bargaining Agreement containing 49 Articles which covers Keller's drivers and monitors. You were not included in the negotiations, ratification process, or allowed a voice on the [ICA] However, it will apply to you. Locally negotiated conditions will be 'narrowly limited in scope;'" 3) Unions must collect money from members in the forms of dues, fees, fines and assessments to survive, Teamsters charge employees for the right to drive a school bus or work as a monitor, Teamsters may increase dues and fees, and "… Teamsters request drivers and monitors meeting performance standards be fired for not paying the union[;]" and 4) "You will be part of 'one (1) bargaining unit' which all be [sic] guarantees you will be prevented from ever voting out the Teamsters."

- Slide 22 sets forth the same information as Slide 2.

Employees asked questions during all three meetings, but the record evidence failed to disclose any specifics. Lane's comments during the meetings did not deviate from the contents of the PowerPoint presentation. O'Neil testified Lane stated that the ICA "… would be what we have, and that would be all that we would have if we voted a union in[,]" and that this was communicated by Lane at each of the three meetings she attended. I do not credit this portion of O'Neil's testimony because it was not corroborated by Short, and her testimony was inconsistent and contradictory. For example, O'Neil had initially confirmed that what Lane said during the meeting was consistent with the PowerPoint Presentation both before and after she reviewed the PowerPoint on the record. She later clarified her testimony on redirect examination by stating, "What I recall from the meeting is that when [Lane] came into ***that*** session, it was up on the PowerPoint, and he just said that this collective bargaining agreement [the ICA] would be all that we would have." [Emphasis Added] The foregoing emphasized language suggests that she only heard Lane say this at one meeting, not all three.

Regarding Slides 3 and 4, which accuse Teamsters Organizers of secretly recording the Employer's meetings and posting the audio of Koons depicting him as an evil clown on YouTube, Short admitted to Lane during the first meeting that day that he (Short) recorded the May 9 meetings and created and posted the YouTube video. Still, during the second and third meetings, Lane continued to place the blame on "Teamsters Organizers" for creating and posting the video.

5. *May 17 Lane Letter*[13]

[13] See JE 5.

On May 17, the Employer distributed a letter to employees from Lane advising employees about what he had communicated to them during the May 17 meetings, including, but not limited to:

- "I restate my unhappiness and displeasure with the Teamsters' organizers that secretly recorded our meetings last week and then uploaded the recording to YouTube. […] The most disappointing aspect was overlaying [District Manager] Jim Koons' voice with various pictures of evil, angry clowns. […] Now, thanks to the very Teamster supporters that claim to want to 'drive up standards', it has been posted publicly to the internet that Jim is pictured as evil clowns. […] It was wrong, childish, immature, and unacceptable to do this to Jim. […] We are much, much better than this…."

- "… [W]e learned that the Teamsters have already negotiated a Collective Bargaining Agreement called the [ICA] that will cover you through at least 2027. The [ICA] was negotiated last year and contains nearly 50 articles. You will automatically be covered by [the ICA] without the chance to vote on it or help bargain the language. The [ICA] also insures you will never be able to vote out the Teamsters if you want to. The Teamsters made you part of one bargaining unit which includes locations in at least four states and the Chicago area."

- "… [W]e learned that the Teamsters, while claiming to protect your job, will request good employees be fired for not paying union dues, fees, fines and assessments. I shared a couple of examples with you from this year."

- "Let's finish out the year without any incidents and without the union and their disturbing tactics. We ask you to please say NO to the Teamsters and their union organizers."

6. *May 23 Koons Letter*[14]

On May 23, the Employer distributed an undated letter to employees by posting it at the Keller Location, and possibly at the Employer's other locations. The letter notes, *inter alia*, how Unit employees have learned from the Employer that:

- "The Lewisville CBA offers no financial advantage over the Keller union-free package."

- "Keller receives higher guarantees, more paid holidays, and equal wages without paying union dues and initiation fees."

- "The 2023 Lewisville driver and monitor survey results indicate they are dissatisfied with their union working environment, find policies and rules are unfairly enforced under the CBA, and would not recommend Lewisville as a good place to work."

- "The Teamsters have already negotiated an agreement, the [ICA] valid through 2027, which will cover the Keller location."

- "The [ICA] offers no greater healthcare than your current benefits."

- "The [ICA] all but guarantees you will never be able to vote out the union, even if an overwhelming majority in Keller want the union gone."

[14] See Petitioner Exhibit 10.

- "The Teamsters, unless blocked by law, will seek termination of good employees for not paying the union dues, fees, fines and assessments."

- "The Teamster organizers, who secretly recorded company meetings and conversations, portrayed company representatives as evil, mean clowns on YouTube."

The letter goes on to state how "… over the past few weeks we have seen the effect of an outside party on our location[,]" and it notes:

- "Not trusting each other including finding out you've been secretly recorded, invaded my family's private situation and claiming that I was fibbing about my father's passing[;]

- Resorting to calling fellow co-workers derogatory names just because their views differ than what is trying to be forced on the location. Those hard working co-workers, individually and collectively, don't deserve this treatment[; and]

- Belittling each other and using derogatory images to represent the union's impression of me and anyone else that talked during the secretly recorded meetings."

The letter concludes with: "I have and will continue to work hard for the employees at Keller. I try to make good decisions to support and keep the location moving forward. While I admit there will always be room for improvement, I believe we can best accomplish improvements as a team, without a union. On Thursday, you will decide what type of Keller you want us to be. A union location that is centered around distrust and name-calling, or a union-free location where we continue to work together as a team correcting issues as they arise by looking for creative solutions that best fit all employees at Keller."

7. *"VOTE NO TO UNION" Flier*[15]

The Petitioner asserts the Employer engaged in objectionable conduct by posting (or allowed to be posted) a flier titled "VOTE NO TO UNION" on the Employer's bulletin board at the Keller Location.

The Petitioner provided a photo of the document, not the document itself. The flier appears to be printed on a standard piece of computer paper. The flier is not on Employer letterhead and does not indicate that it was created or posted by, or addressed from the Employer.

The flier has two columns: one titled "Youe [sic] Current Benefits[;] Part Time Employee 5 hours a day[;] Equals 25 hours per week," and the other titled "Union Contract[;] Part Time Employee 4 hours a day[;] Equals 20 hours per week." Under each column are various comparisons, including the assertion in the "Union Contract" column that "City of Keller may cancel the Entire Contract if a Union is In place…" The flier does not provide a source or basis for this assertion.

O'Neil first saw this flier in early May when an employee texted her a picture of it tacked at the bottom left corner of a bulletin board in the hallway directly across from the Unit employees' time clock in the District Building. O'Neil also saw the flier in the same location on the day of the

[15] See Petitioner Exhibit 11.

election. O'Neill also received an unspecified number of texts, from an unspecified number of employees, on unspecified dates, stating that the flier was on the bulletin board.

Short first saw this flier on May 17 when a male Unit driver gave Short a copy of it, and that male driver said another driver had given it to him (the male driver). Short took a picture of the flier and sent it to Elmore and other Petitioner organizers. Short also observed an unspecified number of other Unit drivers on unspecified dates distributing this flier to employees at the Employer's Keller Location. On about May 23, an unspecified number of "people" texted Short a picture of the flier on the same bulletin board where O'Neill saw it posted on the day of the election. The Petitioner failed to enter these pictures into the record.

O'Neil and Short corroborated that the Employee Handbook states that employees are not permitted to post on the Employer's bulletin boards without management's permission. Short and O'Neil do not know who created the flier or posted it on the bulletin board. The record evidence failed to disclose that any manager or supervisor communicated anything about the flier to Unit employees, either verbally or in writing.

Board Law

1. Threats

"[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). As explained by the Court, the Board "… must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id*., at 617.

"[I]t is well established that an employer may lawfully compare union and nonunion wages and benefits, respond to employee requests for information about such wages and benefits, and make statements of historical fact." *Keystone Automotive Industries, Inc.*, 365 NLRB No. 60, slip. op. at 2 (2017) citing *Suburban Journals of Greater St. Louis, LLC*, 343 NLRB 157, 159 (2004); *Langdale Forest Products Co.*, 335 NLRB 602 (2001) (employer's newsletter, noting that employees at its nonunion facilities received greater wage increases than employees at its union facility, did not violate Sec. 8(a)(1)). "While an employer may lawfully support its anti-union statements with examples where employees at other companies [or its own] suffered negative consequences following collective bargaining, it may not do so in a manner that employees would reasonably construe as a threat to deliberately pursue the same result." *Shamrock Foods Co.*, 366 NLRB No. 117, slip. op. at 9 (2018) citing *Madison Kipp Co.*, 240 NLRB 879 (1979).

"An employer's telling an employee that it would be in that person's or family's 'best interest' to vote against the union, unaccompanied by threats, is too vague to warrant a finding that

the employer was threatening the employee." *Werthan Packaging*, supra, at 344, 344 FN.4 and cases cited therein.

An employer also runs afoul of the Act, when it promises, either explicitly or impliedly, improved benefits contingent on employees giving up union representation. *Unifirst Corporation*, 346 NLRB 591, 593 (2006). "Determining whether a statement is an implied promise of benefit involves consideration of the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise." *G&K Services, Inc.*, 357 NLRB 1314, 1315 (2011).

It is also permissible for employers to promise to maintain the status quo. *Crown Electrical Contracting, Inc.*, 338 NLRB 336, 336 FN.3 (2002) (employer's statement to employees during a meeting that it "would do whatever it took to keep or maintain employees' current benefits," in response to a question about the financial health of the benefit program, without further elaboration; lawful); *Langdale Forest Products Co.*, supra (employer signed and distributed to employees at meeting a "No Cut Guarantee" stating "If You Vote The Union Out, [the employer] Will Not Cut Your Wages And Will Not Take Away Any Of Your Benefits Or Pensions;" lawful promise to maintain status quo); *Weather Shield Mfg.*, 292 NLRB 1, 1-2 (1988) (same).

2. Statements of Futility

"An unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means." *Wrinkle Bus Co.*, 347 NLRB 1203, 1204 (2006). Thus, the Board will find an employer makes objectionable threats of futility when it conveys to employees that the outcome of negotiations between the parties are foreordained. *Smithfield Foods*, 347 NLRB 1225, 1229-1230 (employer's statements that "no matter what the Union offered, the employees would continue to receive the same wages and benefits as [its] employees at other plants," and that it "was in complete control over the outcome of negotiations," inconsistent with good faith bargaining and objectionable). Statements to the effect that the employer would "bargain from scratch," negotiations would "start at zero," and that imply "employees would gain nothing more from the Respondent at the bargaining table than they would receive without a bargaining agent," constitute impermissible threats of futility. *Aqua Cool*, 332 NLRB 95, 95-96 (2000) citing *Webco Industries v. NLRB*, 217 F.3d 1306 (10th Cir. 2000), enfg. 327 NLRB No. 47 (1998) (bargaining from scratch statements were an unlawful threat of loss of benefits that the union would have to bargain to get back).

3. Misleading Statements

"In cases of alleged campaign misrepresentations, the Board applies the longstanding *Midland [National Life Insurance Co.*, 263 NLRB 127 (1982)] standard under which it will not probe into the truth or falsity of the parties' campaign statements and will not set aside an election on the basis of misleading statements unless 'a party has used forged documents which render the voters unable to recognize propaganda for what it is.' *Midland*, 263 NLRB at 133. The *Midland* standard is premised on a 'view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.' *Id*. at 132, quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977)." *Durham School Services., LP* , 360 NLRB 851, 851 (2004).

4. Disparagement

"Unlawful disparagement generally involves an attempt to undermine the union as bargaining representative, either through falsely ascribing responsibility for the loss of benefits…." *ExxonMobil Research and Engineering Co.*, 370 NLRB No. 23, slip. op. at 7 (2020). But "word of disparagement alone concerning a union or its officials are inefficient for finding a violation…." *Ibid*. citing *Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991). "Thus, an employer may criticize, disparage, or denigrate a union without running afoul…" of the Act." *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006). See *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004) (finding supervisor's comments that "people in the union were stupid;" union representatives were "worthless and no good;" and, a week before the election "fat ass [Union representative] [was] living it up at the Holiday Inn on the employees' dues;" not violative).

Recommendation

For the reasons that follow, I recommend that Objections 4 and 5 be overruled in their entirely because the record evidence failed to disclose that the Employer engaged in any objectionable conduct.

1. Prepetition Conduct

The Petitioner conclusory asserts the Employer objectionably t disparaged the Petitioner by its written communications to employees dated April 17 and April 20. I disagree. There are no explicit or implicit threats or promises of benefits contained therein and, without more, these communications are not objectionable. Further, the April 20 letter does not even reference the Petitioner, and O'Neil's subjective interpretation that the letter was referring to the Petitioner is irrelevant. *Lake Mary Health & Rehabilitation*, 345 NLRB 544, 545 (2005). Moreover, even if I were to assume these communications did amount to objectionable conduct (which I do not), they transpired before the critical period, and they are neither significantly egregious nor do they add dimension or meaning to any *related* postpetition conduct. *Dresser Industries*, supra.

The Petitioner further asserts that Employer engaged in objectionable conduct during the April 17 meeting. I cannot agree. First, the record failed to establish any Unit employees attended this meeting or learned of what was discussed therein. Second, I am unable to conclude Koons engaged in objectionable conduct during this meeting because: 1) it transpired before the critical period; 2) at most, Koons did nothing more than express his opinion that the Employer would be better off without a union and lawful tactics he would undertake to achieve this end; and 3) Koons did not utter any explicit or implicit threat or promise of benefit.

2. May 19 Meetings and May 11 Letter

The Petitioner asserts that the Employer made various objectionable threats of adverse working conditions and loss of benefits if Unit employees unionized, as well as promising employees benefits, implied or otherwise, if they didn't unionize. I disagree. The Petitioner did not allege in its objections that the Employer made objectionable promises, but I will presume it is closely related to the alleged objectionable threat allegations.

The Employer's verbal and written communications did nothing more than accurately compare the *existing* terms and conditions of employment at the Keller Location with those of its Lewisville unionized location. The record evidence failed to disclose that the Employer made any explicit or implied threats or promises of benefit in either the May 11 letter or the May 9 meetings.

The Employer's conduct herein is less controversial than conduct the Board has previously found lawful. In *TCI Cablevision of Washington*, 329 NLRB 700 (1999), "… the employer stated, while a decertification election was pending, that a 401(k) plan was available to most of its employees, but that no union had been able to negotiate the plan into a contract. When asked at one point if the unit employees would receive the plan if the union was voted out, the employer answered affirmatively, but subsequently made clear that it was making no promises. The Board concluded the employer had not unlawfully implied promises of benefits. The Board also stressed that 'the [e]mployer did not tell employees that the only way to receive the 401(k) benefit was to oust the [u]nion.' Instead, the Board pointed to the fact that the employer 'accurately reported that its nonrepresented employees received the benefit' and the employer 'never said that it would never agree with the [u]nion to have such a plan.'" *Unifirst*, supra at 593.

In *Suburban Journals of Greater St. Louis*, supra, after a decertification petition had been filed and about a week prior to the election, and in response to employee questions about unrepresented employees' benefits, the respondent conducted meetings with employees where it "… presented an outline of the represented employees' benefits, including their medical, dental vision, and life insurance plans, a stock purchase plan, their 5-percent wage increase..[,]" and other benefits; "… a chart showing the unrepresented employees' biweekly insurance contributions[; and], for each employee,… a comparison of how much the employee paid for insurance and how much unrepresented employees were paying under the most equivalent employer plan." Id. at 157 The Board found that the respondent's comparison charts did not constitute an implied promise of benefits, noting that the charts reflected benefits already in existence (compared to projections of future benefits), they were presented in response to employee's requests for information, and respondent explicitly stated it could not make any promises in response to questions about what employees would get if they decertified the union. *Id.* at 160.

In *Langdale Forest Products*, supra, respondent mailed a newsletter to employees stating, in pertinent part: "If there is no union, the law would allow us to make improvements without first having to bargain with the union about those improvements. There have been several times where we wanted to give wage improvements immediately. Instead, we had to go through the negotiation process…. Without a union, there is no requirement to bargain before we give an increase. Again, I can't promise you that we will grant benefit and wage increases if the union is voted out. However, based on the small increases negotiated by UFCW here, compared with the larger increases given in our other non-union facilities, you certainly would have been better off here without the union[.]" *Id.* at 608-609. The Board agreed that the information conveyed in the newsletter was an accurate representation of the law and did not run afoul of the Act.

The Employer's conduct herein is a far cry from the type of benefit comparison the Board will find objectionable. See *Grede Plastics*, 219 NLRB 592 (1975) (employer engaged in objectionable comparison of benefits when it characterized nonunion employees as a "team," told union employees that nonunion employees received greater and more frequent wages and benefits, and requested union employees join "this successful team" thereby suggesting that if they voted out the union and joined the nonunion team they would enjoy the same "team" wages and benefits).

3. <u>The ICA; May 17 Meetings; May 17 Lane Letter; and May 23 Koons Letter</u>

The Petitioner contends that the Employer made objectionable threats and statements of futility by communicating to employees that it would be subject to the terms of the ICA in the event the Petitioner wins the election, and that it would be virtually impossible to vote the

Petitioner out if they unionized. The Petitioner further contends that the Employer made objectionable threats and disparaged the Petitioner by, among other things, informing employees that: 1) the Union would request employees be fired for not paying dues and fees; and 2) the Petitioner was responsible for secretly recording the Employer's meetings, uploading them on YouTube, and portraying Koons as an evil clown. I disagree.

Regarding the ICA, I preliminarily note that its validity was never in dispute; neither party contended on the record or in their post-hearing briefs the ICA was not a legitimate contractual document binding upon them. The ICA specifically provides that its terms and conditions must be applied to Unit employees in the event the Petitioner is certified. Communicating this message to employees is factual and not objectionable. See *TCI Cablevision*, supra at 700 (employer informed employees they would receive a 401(k) plan if they voted a union out not objectionable because the terms of that plan and applicable ERISA provisions required that the plan be available to all employees not represented by a union; as such, the employer's statement was a permissible statement of historical fact); Cf. "…[C]onditions of employment encompass not only those wages, hours, and working conditions in force at the time, but also what the employer commits itself to grant in the future." *Deaconess Medical Center*, 341 NLRB 589, 590 (2004) citing *Liberty Telephone & Communications, Inc.*, 204 NLR 317 (1973).

Regarding the May 17 meetings, the Employer did nothing more than communicate accurate information from the ICA verbatim. As such, I recommend the Petitioner's alleged objectionable conduct during these meetings be overruled.

Regarding the May 17 Lane letter and May 23 Koons letter, the Employer states that the Teamsters "… have already negotiated a Collective Bargaining Agreement called the [ICA] that will cover you through at least 2027[,]" and "…have already negotiated an agreement, the [ICA] valid through 2027, which will cover the Keller location[,]" respectively. Unlike the May 17 meetings, however, the Employer leaves out that "locally negotiated economic provisions and local terms and conditions of employment…" and that "[s]uch local terms and conditions include but are not limited to management rights clauses, grievance and arbitration provisions, assignment of work and hours of work provisions," or anything to that effect. This omission notwithstanding, the Employer's communications were accurate and factual. Importantly, the letter does not communicate: 1) the Employer will *not* bargain with the Petitioner; or 2) any other threat or promise of benefit, express or implied. Moreover, the record failed to establish there were Unit employees who received the letters, but either did not attend the May 17 meetings or did not learn of the ICA's contents.

Regarding the Employer's communications related to the Petitioner's possible request that employees be discharged for failing to pay dues, the Board has repeatedly found similar misstatements of law to be unobjectionable. *Didlake, Inc.*, 367 NLRB No. 125, slip. op. at 2 (2019) citing *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988).

The Employer's statements to the effect that the ICA would make it impossible to vote out the Union are, at most, unobjectionable misstatement of the law, not a threat or statement of futility, because the Employer is not communicating, either directly or indirectly, that it would not bargain with the Petitioner. Where the Employer communicated that the ICA "all but guarantees" employees will never be able to vote out the union (as in the May 23 Koons Letter), I would not even characterize these as misstatements of law, but accurate ones. The unobjectionable misstatements of law are the Employer's statements to the effect that the ICA "insures you will never be able to vote out the Teamsters if you want to," as set forth in the May 17 Lane Letter.

The Petitioner's claim that the Employer knowingly falsely accused the Petitioner of creating and posting the YouTube video must fail. As noted, the record evidence failed to disclose that the Employer made any explicit or implicit threats or promises of benefits and, standing alone, the Employer's accusations do not amount to objectionable conduct. See *Haynes Motor Lines, Inc.*, 273 NLRB 1851, 1851 (1985) (Board found a manager's statement about an employee during a meeting two days preceding the election to the effect that the manager "…was a company man and did not want the Union[,…] it would be fine if the employees wanted the Union, but they should not follow Michelle as a leader because he was organizing the Union out of revenge because the Company did not give him a salesman's job[,… and] Michelle was a "parking lot lawyer" who was gathering information and passing out authorization cards[;]" not violative)." Moreover, and as previously noted, Short was one of the most known and vocal supporters of the Petitioner. The Employer equating Short to an organizer is not only a reasonable analogy, but an unobjectionable and noncoercive one.

1. "VOTE NO TO UNION" Flier on Bulletin Board

The "VOTE NO TO UNION" flier contains, at the least, an implied threat that the Employer would lose the Keller ISD contract if Unit employees unionized. However, I am unable to conclude that the Employer engaged in objectionable conduct because the record evidence failed to disclose that the Employer either posted, ratified or condoned its contents.

There is no record evidence that any supervisor or agent posted or saw the flier on the bulletin board or made statements about same. The record evidence only disclosed that *employees* distributed the flier, took pictures of it and texted it to each other. The Petitioner contends that, because the Handbook prohibits postings on its bulletin boards without management approval, it follows that the Employer authorized and condoned the flier and is responsible for same. But I am unable to make such a conclusory leap without any probative evidence the Employer was aware that the flier was posted on the bulletin board or even existed in the first place. The Petitioner failed to introduce the Handbook into the record, and it did not provide examples of the Employer either rejecting or authorizing any employee's request to post on this or any other bulletin board. I also find it significant that the Petitioner offered into the record one of the pictures of the flier on the bulletin board that O'Neil received by text in the beginning of May, but none of the multiple different pictures received by Short to permit a comparison.

Objection 6: During the critical period, the Employer stated and implied to employees that the Petitioner was creating an unsafe work environment.

The Petitioner requested to withdraw this Objection in its post-hearing brief. Accordingly, I recommend the Regional Director approve the Petitioner's withdrawal request.

VI. CONCLUSION

Based on the foregoing, I recommend that Regional Director: 1) approve Petitioner's requests to withdrawal Objections 2, 3, and 6; and 2) overrule Petitioner's Objections 1, 4, and 5.

VII. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 16 by **August 15, 2023**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov but may not be filed by facsimile transmission. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by no later than 11:59 p.m. Central Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

DATED at Fort Worth, Texas this 1st day of August 2023.

Zachary Austin Long

ZACHARY AUSTIN LONG
HEARING OFFICER